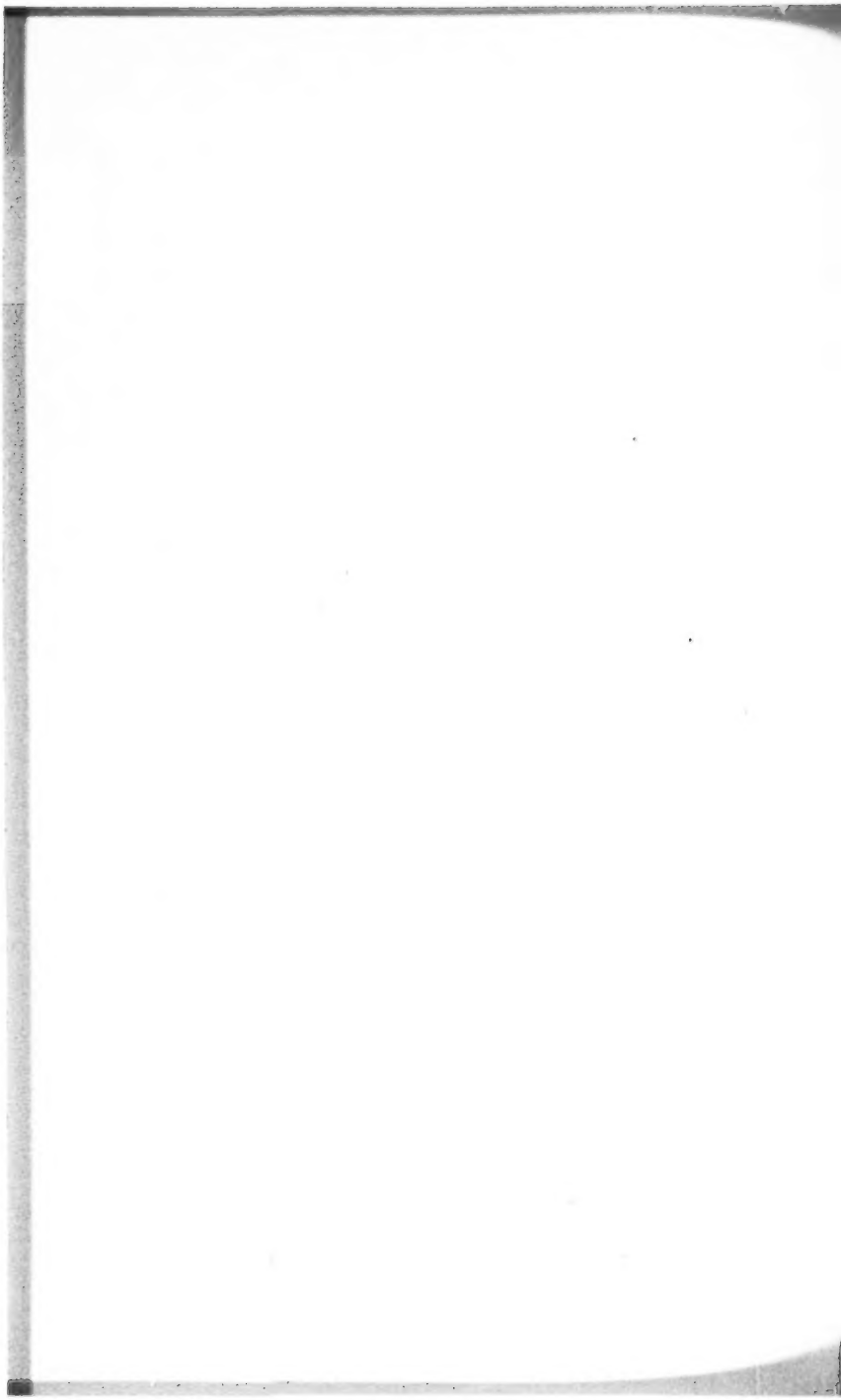
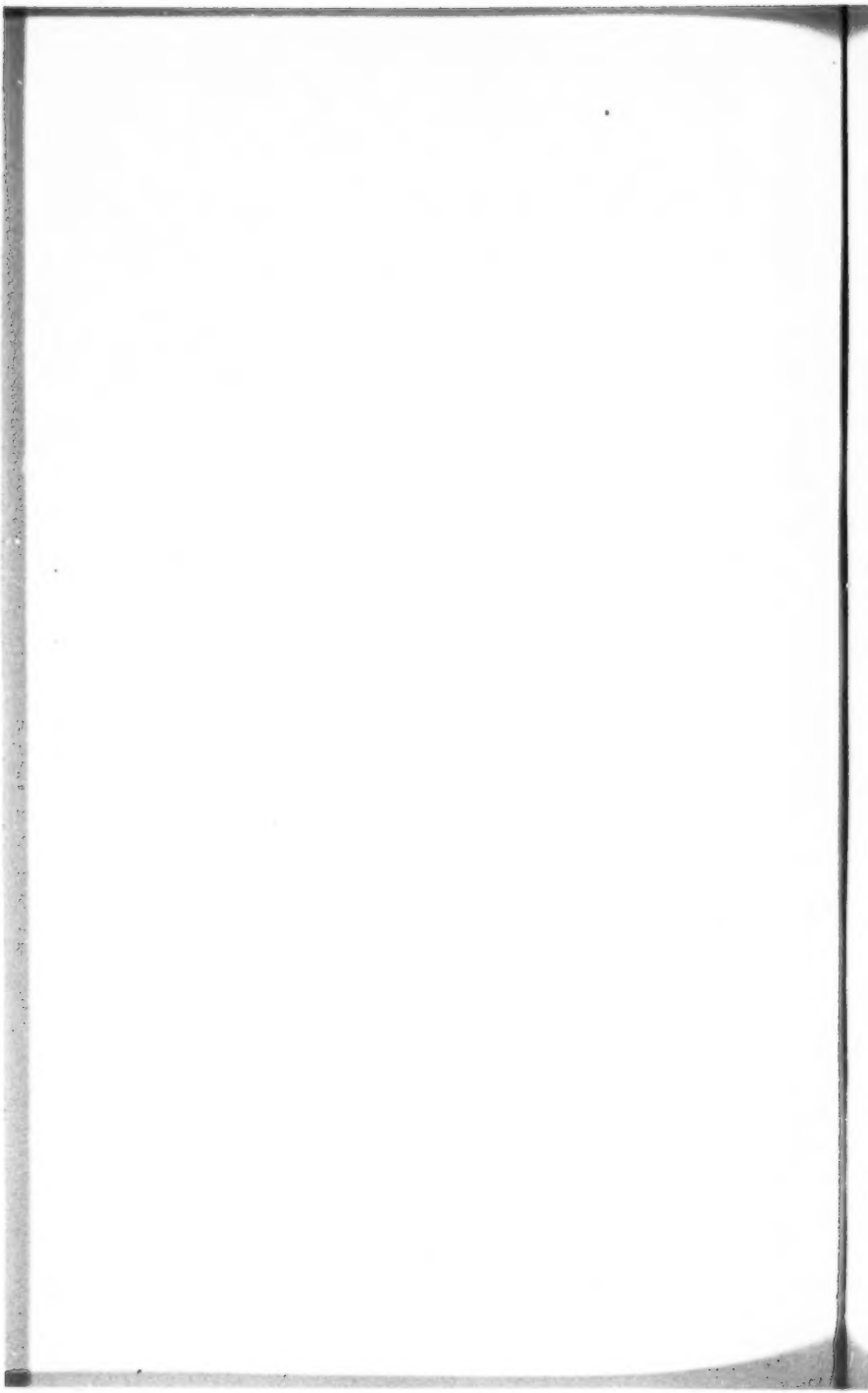


INDEX.

History of case 3-6
Question of discrimination against bank shares in Ohio, discussed 6-26
Findings of fact as bearing upon question of discrimination examined 26-37
Discussion of question of notice to Appellee 37-46
The tax assessed is no greater than ought to have been assessed 46-50
The claim of *res judicata* discussed 50-66
Constitution of Ohio; Sections bearing on taxation 7
Statutes of Ohio; Sections bearing on taxation 7-17



Supreme Court of the United States.

No. 227.

MARCELLUS A. LANDER, AS TREASURER OF CUYAHOGA COUNTY, OHIO,

APPELLANT,

vs.

THE MERCANTILE NATIONAL BANK OF CLEVELAND, OHIO,

APPELLEE.

BRIEF OF APPELLANT.

HISTORY OF CASE.

This is an action in equity begun by The Mercantile National Bank of Cleveland, Ohio, filing its bill of complaint, (Rec. p. 3) in the Circuit Court of the United States, Northern District of Ohio, Eastern Division, in which it sought to enjoin the County Treasurer of Cuyahoga county, Ohio, from collecting taxes assessed for the year 1897 against the holders of the shares of its capital stock, on the ground that the taxes thus assessed violate Section 5219 Revised Statutes of the United States. The bill further averred that the auditor of Cuyahoga county, assessed the total ten thousand shares, which were of the par value of $100.00 each, in the complainant bank, at $519,320.00; that the State Board

of Equalization for Banks increased this valuation to $642,320.00; that the increase was made without notice to the complainant bank, and without giving it an opportunity to be present; that the increase by the State Board of Equalization was from sixty per cent. to seventy-four per cent. of the true value of the shares of stock; that the assessed value of other moneyed capital in the hands of citizens of Cuyahoga county, and the City of Cleveland, does not exceed sixty per cent. of its true value; that the State Board knowingly and designedly made this discrimination against the complainant.

The bill further sets out the substance of Section 2730, Revised Statutes of Ohio, defining "credits," and alleging, that by said section permitting individual citizens to deduct their *bona fide* debts from such "credits," and not permitting the owners and holders of national bank shares so to do it works a discrimination against such owners. Avers that at least $200,000,000 of credits were exempted by this provision; that the shares of building and loan associations created under the laws of Ohio, are, by law, to be considered as "credits," and held as such; that thereby $70,000,000 was by statute exempted from taxation.

The bill further avers that a number of share holders in the complainant bank owe debts which have not been deducted from the value of their shares, and that the evidence of such debts had been tendered to the county auditor. The averments of the bill are that $123,000 should be deducted from the assessment of the State Board of Equalization, upon which taxes to the amount of $3,726.90 have been assessed; and that there should be deducted from said assessment, also, the amount of the indebtedness of the individual stockholders of the bank, the tax on which amounts to $3524.78. The complainant avers that it has tendered the amount due, less the sum in dispute, and prays for an injunction restraining the treasurer from collecting the additional amount.

The complainant further pleads a former adjudication between the complainant and Horatio N. Whitbeck, the predecessor of the defendant as Treasurer of Cuyahoga county, in which it was ad-

judged, as between the parties, that the system of the deduction of debts from credits, under the Statute of Ohio, was a discrimination against the complainant bank, in violation of Section 5219 of the Revised Statutes of the United States.

The defendant filed an answer (Rec. p. 17) and an amendment to answer (Rec. p. 28) presenting an issue upon the fact of notice to the complainant of the hearing before the State Board of Equalization; an issue upon the averments as to the discrimination arising from the operation of the Statute of Ohio, in allowing debts to be deducted from credits; and an issue denying the effect claimed for the former adjudication between the complainant and the predecessor in office of the defendant.

The appointment of a special examiner was made (Rec. p. 23), to take the testimony. After the taking of the testimony, a Special Master was appointed to examine the cause and to make a special finding of fact, and to report the same with his conclusion of law thereon, to the court. (Rec. p. 24.)

The Special Master made his report, (Rec. pp. 34-70 inclusive). To this report the bank filed an exception (Rec. p. 420), and the treasurer filed certain exceptions (Rec. p. 423).

The exceptions of both parties were argued before Hon. William H. Taft, United States Circuit Judge, December 23, 1899; the opinion of the court rendered thereon being found on pages 429 to 438 of the Record. The decree rendered by that court sustained the exceptions filed by the treasurer and dismissed the complainant's bill at its cost.

Appeal was taken by the Bank to the United States Circuit Court of Appeals for the Sixth Circuit, where the cause was argued, and decision rendered December 10, 1900, reversing the judgment of the Circuit Court, remanding the cause to the Circuit Court, with instructions to enter the decree in favor of Complainant. For the opinion of the Circuit Court of Appeals, see Record, pp. 449 to 462 inclusive.

From the decree of that court, the successor in office of the former county treasurer prosecutes his appeal to this court, seek-

ing the reversal of the judgment and decree of the Circuit Court of Appeals.

ARGUMENT.

Among the assignment of errors made by the Appellant, special reliance is placed upon the following propositions:

I.

The court erred in holding that the allowance, by the laws of Ohio, of various exemptions from taxation of moneyed capital in the hands of individual citizens of Ohio, as set forth in the Complainant's bill of complaint, result in and make an unjust and unlawful discrimination against moneyed capital invested in National Bank Shares, so as to violate Section 5219 of the Revised Statutes of the United States.

II.

The court erred in holding, that the former adjudication between the Complainant and the Treasurer of Cuyahoga County, Ohio, in 1887, 1893 and 1894, as shown by the record, was conclusive of the right of the shareholders of the Complainant Bank to deduct their bona fide indebtedness from the value of their shares for purposes of taxation; and was conclusive against the Treasurer in contesting such claim of right.

The proposition first above stated, has been before this court in several cases, which we will cite hereafter. We consider it as fully sustained by the authorities. The proposition has been held by this court to require a construction of the operation of the State Constitution and Statute Law, upon the subject of taxation, with that of the provisions of Section 5219, Revised Statutes of the United States. Each must be viewed in the light of the operation of the other, because, every exemption from taxation under the Constitution and Laws of Ohio, does not amount to a "discrimination" under Section 5219, Revised Statutes of the United States. As the right of the Complainant to recover is based upon an alleged violation of that section, and of rights guaranteed by the

Constitution of Ohio, we set forth *in extenso* the sections of the Constitution applicable herein, and of the statutes enacted pursuant thereto as they existed at the time in question.

OHIO CONSTITUTION:

Section 2, Article 12.

"Laws shall be passed, taxing by uniform rule, all moneys, credits, investment in bonds, stocks, joint stock companies or otherwise; and also all real and personal property according to its true value in money; but burying grounds, public school houses, houses used exclusively for public worship, institutions of purely public charity, public property used exclusive'y for any public purpose, and personal property to an amount not exceeding in value two hundred dollars, for each individual, may by general laws, be exempted from taxation; but, all such laws shall be subject to alteration or repeal; and the value of all property so exempted, shall from time to time, be ascertained and published as may be directed by law."

OHIO CONSTITUTION:

Section 3, Article 12, Constitution.

"The General Assembly shall provide by law, for taxing notes and bills discounted or purchased, moneys loaned, and all other property, effects or dues, of every description, (without deduction) of all banks; now existing, or hereafter created, and of all bankers, so that all property employed in banking, shall always bear a burden of taxation equal to that imposed upon the property of individuals."

OHIO CONSTITUTION:

Section 4, Article 13, Constitution.

"The property of corporations, now existing or hereafter created, shall forever be subject to taxation, the same as the property of individuals."

Revised Statutes of Ohio, Section 2730.

"In this title the terms "real property" and "land" shall be held to mean and include not only land itself, whether laid out in town lots or otherwise, with all things contained therein, but also, unless otherwise specified, all buildings, structures and improve-

ments; and fixtures of whatever kind thereon, and all rights and privileges belonging, or in any wise appertaining thereto;

The terms "investments in bonds" shall be held to mean and include all moneys in bonds, or certificates of indebtedness, or other evidence of indebtedness of whatever kind, whether issued by incorporated or unincorporated companies, towns, cities, villages, townships, counties, states, or other incorporations, or by the United States, held by persons residing in this state, whether for themselves or others;

The terms "investments in stocks" shall be held to mean and include all moneys invested in the capital or stock of any association, corporation, joint stock company or other company, the capital or stock of which is or may be divided into shares, which are transferable by each owner without the consent of the other partners or stockholders, for the taxation of which no special provision is made by law, held by persons residing in this state, either for themselves or others;

The terms "personal property" shall be held to mean and include first, every tangible thing, being the subject of ownership, whether animate or inanimate, other than money, and not forming a part of any parcel of real property, as hereinbefore defined; second, the capital stock, undivided profits, and all other means not forming part of the capital stock of every company, whether incorporated or unincorporated, and every share, portion, or interest in such stock, profits or means, by whatsoever name the same may be designated, inclusive of every share or portion, right or interest, either legal or equitable, in and to every ship, vessel, or boat of whatsoever name or description, used, or designed to be used, either exclusively or partially, in navigating any of the waters within or bordering on this state whether such ship, vessel or boat shall be within the jurisdiction of this state, or elsewhere, and whether the same shall have been enrolled, registered, or licensed at any collector's office or within any collection district in this state or not; third, the money loaned on pledge or mortgage of real estate, although a deed or other instrument may have been given for the same, if between the parties the same is considered as security merely;

The term "money" or "moneys," shall be held to mean and include any surplus or undivided profit held by societies for savings, or banks having no capital stock, gold and silver coin, bank notes

of solvent banks in actual possession, and every deposit which the person owning, holding in trust, or having the beneficial interest therein, is entitled to withdraw in money on demand;

The term "credits" shall be held to mean the excess of the sum of all legal claims and demands whether for money or other valuable thing, or for labor or service due, or to become due, to the person liable to pay taxes thereon, including deposits, in banks, or with persons in or out of this state, other than such as are held to be money, as hereinbefore defined, when added together (estimating every such claim or demand at its true value in money) over and above the sum of legal bona fide debts owing by such person; but in making up the sum of such debts owing there shall be taken into account no obligation to any mutual insurance company, nor any unpaid subscription to the capital stock of any joint stock company, nor any subscription for any religious, scientific, literary, or charitable purpose; nor any acknowledgment of any indebtedness unless founded on some consideration actually received and believed at the time of making such acknowledgment to be a full consideration therefor, nor any acknowledgment made for the purpose of diminishing the amount of credits to be listed for taxation; nor any greater amount or portion of any liability as surety, than the person required to make the statement of such credits believes that such surety is in equity bound and will be compelled to pay, or to contribute, in case there be no securities; provided, that pensions receivable from the United States shall not be held to be credits; and no person shall be required to take into account in making up the amount of credits a greater portion of any credits than he believes will be received or can be collected, or any greater portion of any obligation given to secure the payment of rent than the amount that shall have accrued on any lease, and remain unpaid; words importing the masculine gender shall apply to females also, and the word "person" or party," or other word importing the singular number, shall be held to include firms, companies, associations, and corporations; and all words in the plural number shall apply to single individuals also in all cases in which the spirit and intent may require it."

Revised Statutes of Ohio, Section 2731.

"All property whether real or personal in this state, and whether belonging to individuals or corporations; and all moneys, credits, investments in bonds, stocks or otherwise, of persons re-

siding in this state, shall be subject to taxation except only such as may be expressly exempted therefrom; and such property, moneys, credits, and investments, shall be entered on the list of taxable property as prescribed in this title; all tracts of land, set apart for school or ministerial purposes and sold by and under authority of law, and all lands which shall be hereafter sold by the United States, shall be subject to taxation as other lands in this state immediately after such sale; but school or ministerial lands shall not be sold for taxes until the purchase money therefor shall be fully paid but shall be returned as delinquent and continue on the duplicate, with the taxes of each year charged thereon and added to the tax and penalty due when the same became delinquent, until payment be made by the purchaser or his assigns, of such purchase money with the tax and penalty or the lands resold by the county auditor, pursuant to the laws now or hereafter in force for the sale of such lands."

Revised Statutes of Ohio, Section 2732.

"The following property shall be exempt from taxation:

First: All public schoolhouses, and houses used exclusively for public worship, the books and furniture therein, and the grounds attached to such buildings necessary for the proper occupancy, use and enjoyment of the same, and not leased or otherwise used with a view to profit; all public colleges, public academies, all buildings connected with the same, and all lands connected with public institutions of learning, not used with a view to profit. This provision shall not extend to leasehold estates of real property held under the authority of any college or university of learning in this state. Provided, nevertheless, that all leaseholds, or other estates or property whatsoever, real or personal, the rents, issues, profits and income of which have been, or hereafter shall be given to any city, town, village, school district or sub-district in this state, exclusively for the use, endowment or support of schools for the free education of youth without charge, are and shall be exempt from taxation so long as such property, or the rents, issues, profits and income thereof shall be used and applied exclusively for the support of free education by such city, town, village, district or sub-district."

Second: "All lands used exclusively as graveyards, or grounds for burying the dead, except such as are held by any person, persons, company or corporation, with a view to profit, or for the purpose of speculating in the sale thereof.

Third: "All property, whether real or personal, belonging exclusively to the State or United States.

Fourth: "All buildings belonging to counties, used for holding courts, for jails or for county offices, with the ground, not exceeding, in any county, ten acres, on which such buildings are erected.

Fifth: "All lands, houses and other buildings belonging to any county, township or town, used exclusively for the accommodation or support of the poor.

Sixth: "All buildings belonging to institution(s) of purely public charity, and all buildings belonging to and used exclusively for armory purposes by lawfully organized military organizations which are and shall continue to be fully armed and equipped at their own expense and by law made subject to all calls of the governor for troops in case of war, riot, insurrection or invasion together with the road (land) actually occupied by such institutions, and that owned and used as sites for such armory buildings of said military organizations not leased or otherwise used with a view to profit, and all moneys and credits appropriated solely to sustain and belonging exclusively to said institutions and military organizations.

Seventh: "All fire-engines and other implements used to (for) the extinguishment of fires, with buildings used exclusively for the safe-keeping thereof, and for the meeting of fire companies, whether belonging to any town or to any fire company organized therein.

Eighth: "All market-houses, public squares, or other public grounds, town or township houses or halls, used exclusively for public purposes, or erected by taxation for public purposes notwithstanding some parts thereof may be leased under and by virtue of Section 2566 of the Revised Statutes of Ohio, and all works, machinery, pipe-lines and fixtures belonging to any town and used exclusively for conveying water to such town, or for heating or lighting the same, and any unpaid taxes assessed against any property comprised in this sub-division, with any penalty thereon, is hereby remitted.

Ninth: "Each individual residing in this state may deduct a sum not exceeding one hundred dollars as exempt from taxation, from the aggregate listed value of his taxable personal property of any kind of which such individual is the actual owner, except dogs,

Tenth: "All funds raised and set apart for the purpose of building monuments to the fallen soldiers of this state, and all monuments and monumental buildings, when erected shall be forever exempt from taxation for any purpose whatever."

Revised Statutes of Ohio, Section 2736.

"Each person required to list property shall, annually, upon receiving a blank for that purpose from the assessor, or within five days thereafter, make out and deliver to the assessor a statement, verified by his oath, as required by law, of all the personal property, moneys, credits, investments in bonds, stocks, joint stock companies, annuities, or otherwise, in his possession, or under his control, on the day preceding the second Monday of April of that year, which he is required by law to list for taxation, either as owner or holder thereof, or as parent, husband, guardian, trustee, executor, administrator, receiver, accounting officer, partner, agent, factor, or otherwise; and also all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise, held on said day by another, residing in or out of this state, for, and belonging to the person so listing, or anyone residing in this state, for whom he is required by law to list, and not listed by such holder thereof, for taxation in this state."

Revised Statutes of Ohio, Section 2737.

Such statement shall truly and distinctly set forth, first, the number of horses, and the value thereof; second, the number of neat cattle, and the value thereof; third, the number of mules and asses, and the value thereof; fourth, the number of sheep, and the value thereof; fifth, the number of hogs, and the value thereof; sixth, the number of pleasure carrigaes of whatever kind, and the value thereof; seventh, the total value of all articles of personal property, not included in the preceding or succeeding classes; eighth, the number of watches and value thereof; ninth, the number of piano fortes and organs, and the value thereof; tenth, the average value of the goods and merchandise, which such person is required to list as a merchant; eleventh, the value of the property which such person is required to list as a banker, broker, or stock-jobber; twelfth, the

average value of the materials and manufactured articles which such person is required to list as a manufacturer; thirteenth, moneys on hand or on deposit subject to order; fourteenth, the amount of credits as hereinbefore defined; fifteenth, the amount of all moneys invested in bonds, stocks, joint stock companies, annuities, or otherwise; sixteenth, the monthly average amount or value, for the time he held or controlled the same, within the preceding year, of all moneys, credits, or other effects, within that time invested in, or converted into bonds or other securities of the United States, or of this state, not taxed, to the extent he may hold or control such bonds or securities on said day preceding the second Monday of April; and any indebtedness created in the purchase of such bonds or securities shall not be deducted from the credits under the fourteenth item of this section; but the person making such statement may exhibit to the assessor the property covered by the first nine items of this section, and allow the assessor to affix the value thereof, and in such case the oath of the person making the statement shall be in that regard only that he has fully exhibited the property covered by said nine items.

Revised Statutes of Ohio, Section 2739.

"In listing personal property, it shall be valued at the usual selling price thereof, at the time of listing, and at the place where the same may then be; and if there be no usual selling price known to the persons whose duty it is to fix a value thereon, then at such price as it is believed could be obtained therefor, in money, at such time and place; investments in bonds, stocks, joint stock companies, or otherwise, shall be valued at the true value thereof in money; money, whether in possession or on deposit shall be entered in the statement at the full amount thereof, except that depreciated circulating notes shall be entered at their current value; every credit for a sum certain payable either in money, property of any kind, labor or service, shall be valued at the full amount of the sum so payable, except that if it be for a specific article, or for a specified number or quantity of any article or articles of property, or for a certain amount of labor or service of any kind, it shall be valued at the current price of such property or of such labor or service, at the place where payable; and annuities,

or monies receivable at stated periods, shall be valued at the sum which the person listing the same believes them to be worth in money at the time of listing."

Revised Statutes of Ohio, Section 2758.

UNINCORPORATED BANKS.

"Every company, association, or person, not incorporated under any law of this state, or of the United States for banking purposes, who shall keep an office or other place of business and engage in the business of lending money, receiving money on deposit, buying and selling bullion, bills of exchange, notes, bonds, stocks, or other evidences of indebtedness, with a view to profit shall be deemed a bank, banker, or bankers, within the meaning of this chapter."

Revised Statutes of Ohio, Section 2759.

"All unincorporated banks and bankers shall annually, between the first and second Mondays of May, make out and return to the auditor of the proper county, under oath of the owner or principal officer or manager thereof, a statement setting forth:

First: The average amount of notes and bills receivable discounted or purchased in the course of business by such unincorporated banks, banker or bankers, and considered good and collectable.

Second: The average amount of accounts receivable.

Third: The average amount of cash and cash items in possession or in transit.

Fourth: The average amount of all kinds of stocks, bonds, including the United States government bonds, or evidences of indebtedness held as an investment, or in any way representing assets.

Fifth: The amount of real estate at its assessed value.

Sixth: The average amount of all deposits.

Seventh: The average amount of accounts payable, exclusive of current deposit accounts.

Eighth: The average amount of United Stated government and other securities that are exempt from taxation.

Ninth: The true value in money of all furniture and other property not otherwise herein enumerated.

From the aggregate sum in the first five items above enumerated, the said auditor shall deduct the aggregate sum of the fifth, sixth, seventh, and such portions of the eighth as are by law exempt from taxation, and the remainder thus obtained added to the amount of item nine, shall be entered on the duplicate of the county in the name of such bank, banker or bankers, *and taxes thereon shall be assessed and paid the same as provided for other personal property assessed and taxed in the same city, ward or township.*

Revised Statutes of Ohio, Section 2759a.

"The said bank, banker or bankers shall, at the same time, make statement under oath, of the amount and capital paid in or employed in such banking business, together with the number of shares or proportional interest each share holder or partner has in such association or partnership."

Revised Statutes of Ohio, Section 2759b.

"That the provisions of Section 2759 shall apply to and govern savings banks incorporated under the act of April 16, 1867."

Revised Statutes of Ohio, Section 2760.

"The averages provided for in the preceding section shall be obtained by adding together the amounts of each item above specified, owned by or standing on the books of such bank, banker or bankers, on the first Monday of each month of the year preceding the Monday in May in which the return is made, and dividing the same by the number of months in the year; provided, that in cases where such bank, banker or bankers commenced business during the preceding year, the division shall be made by the number of months elapsed after the commencement of such business."

Revised Statutes of Ohio, Section 2761.

"When any person, persons, company or association unincorporated, shall commence or engage in the business of banking, after the day preceding the second Monday in April, in any year, the average value of whose personal property intended to be employed in such business shall not have been previously entered on the assessor's list for taxation, in said county, such person, per-

sons, company, or association shall report to the auditor of the county the probable average value of the personal property by him or them intended to be employed in such business until the day preceding the second Monday in April thereafter, and shall pay into the treasury of such county a sum which shall bear the same proportion to the levy for all purposes, on the average value so employed, as the time from the day on which he or they shall commence or engage in such business as aforesaid, to the day preceding the second Monday in April next succeeding, shall bear to one year."

Revised Statutes of Ohio, Section 2762.

"All the shares of the stockholders in any incorporated bank or banking association, located in this state, whether now or hereafter incorporated or organized under the laws of this state or of the United States, shall be listed at their true value in money, and taxed in the city, ward, or village where such bank is located and not elsewhere."

Revised Statutes of Ohio, Section 2763.

"Real estate of any such bank or banking association shall be taxed in the place where the same may be located, the same as the real estate of individuals."

Revised Statutes of Ohio, Section 2764.

"There shall at all times be kept in the office where the business of such bank or banking association is transacted, a full and correct list of the names and residences of the stockholders therein, and the number of shares held by each, which shall be at all times during business hours open to the inspection of all officers who are or may be authorized to list or assess the value of such shares for taxation."

Revised Statutes of Ohio, Section 2765.

"The cashier of each incorporated bank shall make out and return to the auditor of the county in which it is located, between the first and second Monday of May, annually, a report in duplicate, under oath, exhibiting, in detail, and under appropriate heads, the resources and liabilities of such bank, at the close of business on the Wednesday next preceding said second Monday, together with a full statement of the names and residences of the stockholders therein, with the number of shares held by each, and the par value of each share."

Revised Statutes of Ohio, Section 2766.

"Upon receiving such report the county auditor shall fix the total value of the shares of such banks according to their true value in money and deduct from the aggregate sum so found the value of the real estate included in the statement of resources as the same stands on the duplicate, and thereupon he shall make out and transmit to the annual state board of equalization for incorporated banks a copy of the report so made by the cashier, together with the valuation of such shares as so fixed by the auditor."

Revised Statutes of Ohio, Section 2769.

"If any bank shall fail to make out and furnish to the county auditor the statement required, within the time herein fixed, it shall be the duty of said auditor to examine the books of said bank; also, to examine any officer or agent thereof under oath, together with such other persons as he may deem proper, and make out the statement. Any bank officer failing to make out and furnish to the county auditor the statement, or willfully making a false statement, as required in Section 2765, shall be liable to a fine not exceeding $100, together with costs and other expenses incurred by the auditor or other proper officer in obtaining such statement aforesaid; and said auditor shall have the same powers, and the probate judge of the county sha'l exercise the same powers, and perform the same duties in aid of the auditor in the performance of his duties under this section, as are authorized by law in cases where the county auditor is informed, or has reason to believe, that any party has failed to make any return, or has made a false return for taxation; and the statement so made out by the auditor shall in all respects stand as the statement required to be made by the cashier."

The complainant in the court below relied upon the above quoted sections of the Constitution of the State of Ohio, and the sections of the Statutes of Ohio, in attempting to make out his claim for equitable relief in that court. It sets forth at length in paragraph six of its bill of complaint, Section 2 of Article 12, Section 3 of Article 12, and Section 4 of Article 13 of the Constitution of Ohio, and says that those sections have been violated

by the conduct and actions of the various assessing and taxing officers which listed complainant's bank shares for taxation.

In paragraph seven of its bill of complaint, Section 2730 of the Revised Statutes is plead in effect, also Sections 2736 and 2737.

In paragraph eight the complainant avers.

"That a large amount of moneyed capital in the hands of individual citizens of the State of Ohio invested in promissory notes and other legal obligations, securities, claims and demands amounting to several hundred million dollars, is by the aforesaid sections allowed a deduction of legal bona fide debts to be made therefrom, and that the same are expressly exempted from taxation."

By the reading of said sections of complainant's bill of complaint the pertinence of an examination into the construction made by the Supreme Court of Ohio and the Supreme Court of the United States of said several sections of the Constitution and of the statute is made apparent.

One of the earliest cases in Ohio construing the foregoing sections was the case of the Exchange Bank of Columbus vs. Hines, 3 O. S., 1. This involved incidentally the question above stated.

On the thirteenth day of April, 1852, the Legislature of Ohio passed a law for the taxation of personal property, including moneys and credits, which is found on page 135 of the laws of Ohio for the year 1852, and also on page 901 of Swan's Statutes of 1854. The 10th Section of that act provided that in making up the amount of "moneys and credits" a person might deduct from the gross amount of "moneys and credits" the amount of his bona fide debts, etc. In the case cited the constitutionality of this section was attacked. The claim made by counsel, who asserted the unconstitutionality of the act, was that it permitted a person to deduct the amount of his bona fide debts from his *moneys and credits* and, while it was argued that debts cannot be deducted from *moneys and credits*, yet the stress of the argument, to show that the law was unconstitutional, was laid upon that por-

tion of the section which permitted the deduction of debts from *moneys*. The court held that section of the law unconstitutional in the following language (Syllabus):

"The tenth section of the law which allows individuals and certain corporations, in giving their tax lists, to deduct their liabilities from the amount of their *moneys and credits* is repugnant to the Constitution of Ohio and is void."

"The Constitution permits no deduction of liabilities from *moneys and credits*."

By that decision the deduction of bona fide debts was denied. The question came up later in the case of Latimer vs. Morgan, 6 O. S., 280, and in that decision the principle announced in the case of Exchange Bank of Columbus vs. Hines was approved and followed in the following language:

"The decision in the case of the Exchange Bank of Columbus vs. Hines, 3 O. S., 1, giving a construction to the second and third sections of the 12th Article of the Constitution and declaring unconstitutional and void the 10th section of the tax law of April 13, 1852, is approved and followed."

Section 10 of said law being inoperative by reason of the decision in the above cases, the Legislature of Ohio passed an act on the first day of April, 1856, which act is found on page 52 of volume 53 of the Ohio Laws, therein is found a statutory definition for the term "credits," and further an enumeration of the obligations that may be exempted from taxation by deducting the same from "credits" as therein defined; but the court will observe that the deduction of legal bona fide debts was not to be made from "moneys and credits" but from "credits" alone, and those only of a certain class; also that the debts to be deducted are of a certain class and do not include debts generally. This plainly raised a different proposition than the one that was presented in the case of Bank vs. Hines and Lattimer vs. Morgan, supra, and the Supreme Court of Ohio in passing upon this amendatory act in the case of Payne vs. Watterson, 37 O. S., 121, said:

"Under Title 13 of the Revised Statutes relating to taxation, a person required to list property is not authorized to deduct his

debts from his *investments in bonds* as therein defined and to return the excess only for taxation."

That case presented the question whether debts could be deducted from "investments in bonds" of certain corporations then held and owned by the plaintiff in error.

In passing upon that question the court decided that "investment in bonds" were not "credits" and therefore a deduction on account of debts could not be made from "investments in bonds," and they again affirmed the decision in the case of Bank vs. Hines.

This statute of April 1, 1856, defining the meaning of the word "credits" was re-enacted in substantially the same words in the laws of 1854, page 173, Section 1; also in the laws of 1875, page 437; and again in the laws of 1876, page 29, and now forms Section 2730 of the Revised Statutes of Ohio above quoted.

This question was again presented to the Supreme Court of Ohio in the case of Treasurer vs. Bank, 47 O. S., 503. In that case the question was presented of the right of an unincorporated bank to deduct its debts from "its cash and cash items," and arose upon the plea of the unconstitutionality of Subdivision 3 of Section 2759 of the Revised Statutes of Ohio. The Supreme Court of Ohio in deciding that case said:

"A deduction under Section 2759 of the average amount of all debts and the average amount of accounts payable, exclusive of current deposit accounts, from the average amount of notes and bills receivable, discounted or purchased in the course of business, by such incorporated bank or bankers, and considered good and collectible, would not be in conflict with either of the above named sections of the Constitution; but the same deduction from the average *amount of cash and cash items* in possession would contravene Section 2 of Article 12 of the Constitution. * * *

"The average amount of all debts, and all accounts payable, returned by the defendant in the sixth and seventh items of its statement, should therefore be deducted from the average amount of all its notes and bills receivable discounted or purchased.

"But this deduction should not be made from the average *amount of cash and cash items* in possession; money or cash, for the most part, is regarded and treated as property in possession, hav-

ing intrinsic value and not the mere evidence of claims upon others. As property in hand of a tangible nature, distinctive in itself, and determinable as to value without the uncertainty of mere choses in action, it cannot be reduced or diminished on the tax duplicate by deducting from it the liabilities of the owner—whether individual or corporation—without an infringement of the constitutional requirement that *all* property shall be taxed by a uniform rule. And that portion of Section 2759 of the Revised Statutes, which directs the auditor to make the enumerated deductions, so far as it includes any aggregate from which the deductions are to be made, of the average *amount of cash and cash items* in possession, is, in our view, repugnant to the Constitution and void, but it is not otherwise objectionable on constitutional grounds."

"And furthermore the elimination of the right to make deduction from the average amount of cash and cash items in possession, would only leave the bank on a footing of that equality *with individuals contemplated in the Constitution*—clothed with the right of deducting the sum of its legal bona fide debts, from the amount of its claims and demands; and of being taxed on the excess as credits."

Therein, the court will notice the question at issue was whether a bank or an individual could deduct his bona fide debts, from what is denominated "cash and cash items;" and the court held that in so far as the Statute of Ohio permitted that to be done it was unconstitutional.

The next case following on this question decided by said court is the case of Niles vs. Shaw, 50 O. S., 370. *This case we contend is the first authoritative expression by the Supreme Court of Ohio of the identical question that is raised in this case.* In all the other cases that have preceded Niles vs. Shaw in the State of Ohio, other propositions were linked with the question of the right to deduct debts from credits—and in considering it special stress was laid upon other phases of the question presented, more than upon the question of deduction of some *debts* from some *credits*.

In Niles vs. Shaw, supra, the court decided:

"Our laws do not authorize the deduction from the value of

shares in a national bank entered on the duplicate for taxation, of legal bona fide debts owing by the holder of such shares of stock." Within that decision will be found the classification made by the Supreme Court of Ohio assigning shares of stock in a national bank to that subdivision of Section 2730 known as "investments in stocks." Shares in national banks are held by the court to be investments in stocks and not credits, and not being credits they are not permitted to be reduced in amount by the deduction of bona fide debts therefrom, for the reason that under our statute bona fide debts can only be deducted from "credits" and not from "investments in stocks."

The decision of Niles vs. Shaw was followed by the case of Chapman, Treasurer of Lorain County, vs. First National Bank of Wellington, in 56 O. S., 310. There the Supreme Court of Ohio in an extensive and able opinion again reconsidered all the cases above cited upon this question, and held:

"In the administration of our tax laws, the holder of national bank shares has no right under the statute, state and national, to deduct his legal bona fide debts from the value of such shares, but he is legally bound to pay taxes upon the assessed value of such shares without deduction on account of such debts. Niles vs. Shaw, 50 O. S., 370, followed and approved.

From the judgment of the Supreme Court of Ohio, the plaintiff in error, the First National Bank of Wellington, prosecuted error to the Supreme Court of the United States. The court handed down its decision on February 27, 1899; sustaining the Supreme Court of Ohio on every proposition announced by them. 173 U. S., 205. On the proposition of the deduction of all debts from the value of bank shares, and of what this court had heretofore held on that question, this court therein said:

* * * *

"*It is stated, however, that this specific question has been otherwise decided in Whitbeck vs. Mercantile Bank of Cleveland* (127 U. S., 193). *If this were true, we should be guided by and follow that decision.* Upon examination of the case it is seen that the court gave chief attention to the question whether an increase in the

value of the shares in national banks made by the State Board of Equalization from sixty per cent. of their true value in money, as fixed by the auditor of Cuyahoga county, to sixty-five per cent., as fixed by the board (other property being valued at sixty per cent.), amounted to such a discrimination in the taxation of the shareholders of such banks as is forbidden by the Federal statute. It was held that it did.

"Coming to the question of the deduction of the bona fide indebtedness of shareholders, *the court assumed that under the statute of Ohio owners of all moneyed capital other than shares in a national bank were permitted to deduct their bona fide indebtedness from the value of their moneyed capital*, but that no provision for a similar deduction was made in regard to the owner of shares in a national bank, and it was held that the owners of such shares were entitled to a deduction of their indebtedness from the assessed value of the shares as in the case of other moneyed capital. *The point to which the court chiefly directed its attention related to the question whether a timely demand had been made for such deduction of indebtedness.* It was held that it was made in time, for the reason that the court below expressly found that "the laws of Ohio make no provision for the deduction of the bona fide indebtedness of any shareholder from the shares of his stock, and provide no means by which such deduction could be secured." As a demand at an earlier period would have been useless, the court held it unnecessary.

An examination of the statutes of Ohio in regard to taxation shows that *debts can only be deducted from credits;* and how much of credits is moneyed capital is unknown. *The case is not authority adverse to the principle we now hold.*

For the reasons already stated, we think the judgment in this *case should be affirmed.*"

Judge Taft, upon this proposition in the case at bar said:

> "The general result of the evidence is no more satisfactory as showing what amount of discrimination, if any, there is by reason of this definition of credits in the Ohio Statute of tax-

> ation than it was in National Bank of Wellington vs. Chapman, *supra*. For this reason I must conclude, as the Master did, that the averments of the bill as to the discrimination arising upon the operation of this definition of credits against moneyed capital is not such as to justify any action by the court in complainant's favor."

This array of State and Federal authorities settle beyond controversy, the proposition that a holder of shares in a National bank *has not the right to deduct his legal bona fide debts from the value of his shares for purposes of taxation.*

The complainant bank on this question takes refuge behind the decision of the United States Supreme Court in the case of Whitbeck vs. Mercantile National Bank of Cleveland (127 U. S., 193), and assert that that decision is an authority in their favor, and against the position of the State herein. The State contends that the Whitbeck case is denied to be an authority on the question by the Supreme Court of the United States, in the recent decision of First National Bank of Wellington vs. Chapman, supra, for in that case the court said:

> *"If this be true we should be guided by and follow that decision."*

The Whitbeck case is not an authority on the question at issue, but the same is controlled by the decision in the First National Bank vs. Chapman, supra; Bank vs. Ayres (160 U. S., 660); Aberdeen Bank vs. Chehallis Co. (166 U. S., 440), and Bank of Commerce vs. Seattle (and three other cases therein cited), 166 U. S., 463.

Another reason urged by us in our brief in the case of First National Bank of Wellington vs. Chapman, Treasurer (and seemingly adopted by the Supreme Court of the United States), why the Whitbeck case should have no controlling influence in the determination of this question, was that at the time of the rendition of the judgment by the Federal Supreme Court in the Whitbeck case, there had been no decision by the Supreme Court of Ohio upon the express question.

This is made apparent by an examination of the dates of the decisions.

The Whitbeck case (127 U. S., 193) was decided April 23, 1888. The *first decision of the Supreme Court of Ohio* on the right of shareholders in national banks to deduct their *bona fide* debts from the amount of their shares, was that of Niles vs. Shaw, 50 O. S., 370, decided May 9, 1893. In which decision bank shares were first classified under Sections 2730 and 2731 of the Revised Statutes of Ohio, as "investments in stocks," and not as "credits." That was a construction of our state taxing statute by the Supreme Court of our state.

The Supreme Court of the United States will follow the decision of the highest court of a state in the construction of its statutes. If the State Supreme Court has announced no decision on the construction of a state statute, the Federal Supreme Court, in the absence of such construction, will give to the state statute a construction of its own; but if the Supreme Court of the state *afterwards announces a contrary construction such construction will be followed by the Federal Court.*

That is exactly what has been done upon this question.

Upon this question the authorities are so numerous we will not weary the court with their citation, except the following which seems directly in point.

In the First National Bank of Garnett vs. Ayres, 160 U. S., 660, it is held that:

"By the decision of the Supreme Court of Kansas, Section 6847, of the General Statutes of that state, defining the word "credit," as used in the chapter providing for the assessment and collection of taxes, was held not to include shares of stock in a national or state bank, and the owners of such shares were held to have no right under that statute to deduct from the assessed value of their shares the amount of their debts. *This court is bound by the interpretation given to the Kansas statute by the Supreme Court of that state.* (New York vs. Weaver, 100 U. S., 539, 541.)"

"The construction placed by the Supreme Court of the state on

the Indiana act of March 6, 1891, that the railroad companies are given the right to be present and to be heard before the State Board of Tax Commissioners, is conclusive upon this court."

P. C. & St. L. R. Co. vs. Becker, 154 U. S., 421-427.

II.

An examination of the findings of fact as bearing upon the question of discrimination against bank shares.

The treasurer claims that, as a legal proposition, the bank has failed to show the right of its shareholders to deduct their debts from the value thereof for purposes of taxation. In that portion of the bill it certainly has failed. We, therefore, next examine the finding of fact, to see if, from the facts found, the judgment of the Circuit Court of Appeals should be sustained. We contend that neither, as a proposition of law or fact, was there any discrimination shown against the shares of national banks.

In the fifth paragraph of complainants' bill of complaint it avers (Record, p. 6):

> "The complainant avers that the assessed valuation of its shares so fixed by the State Board of Equalization and so entered on the tax duplicate of Cuyahoga county against its said shareholders was over seventy-four per cent. of the true value of the money, property and assets so as aforesaid thereby covered; that all other personal property, including moneys on deposit, promissory notes and amounts due and receivable, are and have been for many years assessed for taxation by the taxing officers of the State of Ohio at a rate of not exceeding 60 per cent. of their face or apparent value; that the valuation so as aforesaid fixed by said auditor of Cuyahoga county on this plaintiff's shares of stock was fixed at 60 per cent. of the true value thereof, and that such assessment was in conformity with his uniform practice and the uniform practice of the taxing officers of said county and other counties in the State of Ohio on all classes of investments. The plaintiff further avers that said Board of Equalization knowingly and designedly did fix a much higher percentum of valuation and assessment for taxation upon the shares of the plaintiff's capital stock than was assessed upon other moneyed capital in the hands of individual citizens of the State of Ohio, and much higher than that fixed on other moneyed capital in the hands of such citizens in said county of Cuyahoga and said city of Cleveland."

Admitting even, for sake of the argument, that "all of the personal property, moneys on deposit, etc.," were, and for many years had been, assessed by the taxing officers of Ohio at a rate not exceeding 60 per cent. of their value, yet the *complainant bank and its shareholders, at the same time, escaped with being assessed on less than sixty per cent. of the value of their shares, as the facts found show.*

We admit the propriety of the application of the rule, so frequently announced, that

> "In considering a special finding of facts, a Federal Appellate Tribunal can only consider whether the facts found in law support the judgment, and cannot examine the evidence to ascertain whether a finding of facts be thereby justified."
>
> Jenks, Administrator, vs. Stapp, 9 U. S. A., 34.

And in this inquiry limit ourselves to the finding of fact.

In the latter part of the seventeenth finding made by the Master (Record, p. 42), he found that moneyed capital in the hands of individual citizens in Cuyahoga county was assessed for taxation in 1897, as nearly as practicable, at 60 per cent. of its value. He further found, as shown by paragraph 19 of this report (Record, p. 42), that the actual cash value of the shares of stock in complainant's bank was $128.00 per share; and in paragraph 3 (Record, p. 35), that the capital stock of complainant's bank was divided into 10,000 shares; and that therefore the actual cash value as found by the Master was $1,280,000.00.

That pursuant to Section 2760, Revised Statutes of Ohio, there should be deducted from the actual value of the shares, the value of the real estate as the same stands on the duplicate, which the Master finds in the fifth paragraph (Record, p. 35), and in the nineteenth paragraph (Record, p. 42), to amount to $117,370.00, which being deducted from the actual cash value of such shares leaves $1,162,630.00 *as the true value* after deducting the value of the real estate. That computing 60 per cent. upon said amount, the amount at which other property was estimated, it would fix the value upon which taxes should have been computed at $697,578.00,

while the Board of Equalization fixed the value of the shares, for taxable purposes, at only $642,320.00 (8th paragraph, Record, p. 37).

It will thus be seen that the amount of the taxable value of complainant's shares, as compared with their actual value, *was but slightly in excess of fifty-five per cent.*, and therefore no discrimination against complainant's shares was caused by the action of the board, and none existed in favor of any other moneyed capital.

The finding of fact further sustains the valuation as fixed by the Board of Equalization upon complainant's shares, and far in excess thereof, by showing that at the time the cashier of complainant bank made the report of the resources and liabilities thereof, and for six months prior and six months subsequent thereto, such bank sustained no losses; and during all that time made net earnings sufficient out of which to pay a dividend semi-annually of three per cent. on all of its shares, and carried forward at each of said semi-annual periods, to the credit of its shares, net profits varying in amount from $84,000.00 to $99,000.00 (Record, pp. 39 and 40; paragraphs 14, 15 and 16).

The claim of the bank made in argument in the court below, why its return for taxation differed so materially in amount from its return to the Comptroller of the Currency, made at the same time, was, that the bank had sustained some losses which made their valuation materially lower. If it was so claimed, there was no proof to sustain it, and the finding of the Master is directly the contrary, that no losses were sustained, and the actual value, per share, was $128.00. Can this discrepancy between the one return and the other be explained away on the hypothesis of losses sustained by complainant? We claim not.

Section 5204, Revised Statutes United States, reads as follows:

"Section 5204. No association, or any member thereof, shall, during the time it shall continue its banking operations, withdraw or permit to be withdrawn, either in the form of dividends or otherwise, any portion of its capital. *If losses have at any time been sustained by any such association, equal to or exceeding its undivided*

profits then on hand, no dividend shall be made; and no dividend shall ever be made by any association, while it continues its banking operations, to an amount greater than its *net profits* then on hand, *deducting therefrom its losses and bad debts.* All debts due to any associations, on which interest is past due and unpaid for a period of six months, unless the same are well secured, and in process of collection, shall be *considered bad debts* within the meaning of this section. But nothing in this section shall prevent the reduction of the capital stock of the association under section fifty-one hundred and forty-three."

It will be noticed that if losses have at any time been sustained by a national bank equal to or exceeding its undivided profits on hand, no dividend shall be made, and no dividend shall ever be made by any such bank while it continues its banking operations to an amount greater than its net profits then on hand, deducting therefrom its losses and bad debts.

The statute goes further and says, all debts due to any association on which interest is past due and unpaid for a period of six months, unless the same are well secured and in process of collection, shall be considered bad debts within the meaning of this section. The reports of the dividends made to the Comptroller of the Currency are required to contain the loss sustained through bad debts, decrease of values, etc. There cannot be any concealment of bad debts from the Comptroller of the Currency, and then use the same to reduce the taxable valuation of bank shares, but if the "bad debts" exist, by which to reduce the taxable valuation of shares, they must appear in the report made to the Comptroller of the Currency, also in the form provided under Section 5204, R. S. U. S., as well as in the declaration of dividends, as testified to.

By Section 5211, R. S. U. S., the report made to the Comptroller shall be verified by the oath or affirmation of the president or cashier, and attested by the signature of at least three of the directors.

By Section 5212, R. S. U. S., the report of the declaration of dividend must be attested by the oath of the president or cashier of the association.

The proof thereby provided for rises to as high a plane as the affidavit made by the cashier under Section 2765, R. S. of Ohio.

So that, to accept the one as evidence and not the other, when the affidavits are made by the *same officers*, at the *same time*, with regard to the *resources and liabilities* of the *same bank*, would be to set aside all rules of evidence, and conclude the taxing officers of the state, in their endeavors to increase complainant's return.

The manner of the taxation of bank shares is left to the individual states. The constitutional rule of Ohio, of requiring all property to be listed at its true value in money, would and does apply to bank shares. The procedure of listing the same at *a given per cent. of its par value*, if they are so listed, is without statutory or constitutional foundation, and has received no support from the courts, but we here accord to bank shares the same privileges accorded to other moneyed capital, and say it was fair to such investments to return them at 60 per cent. of their true value, but in this case it did not amount to 50 per cent.

In the case of Hepburn vs. The School Directors, 90 U. S., 480, it was held that national bank shares may be valued for taxation at an amount *above their par value*.

In the case of People vs. The Commissioners of Taxes and Assessments, 94 U. S., 415, the U. S. Supreme Court held:

"The shares of stock of a national bank in New York should be assessed for taxation at their actual value."

Ex rel. Williams vs. Albany Board of Assessors, 2 Hun., 583.

People ex rel. Bank vs. New York City, 8 Hun., 536; 94 U. S., 415.

The case above cited (94 U. S., 415) seems to correspond with the case at bar in so many particulars that a statement of the facts might not be out of place.

"The Gallatin National Bank of the City of New York had a capital of $1,500,000.00, divided into 30,000 shares of $50.00 each. It had reserved from profits $300,000.00; it also held on deposit with the treasurer, bonds of the United States of the par value of $591,-

000.00 on which the premium would be $118,200.00; so that the bank had in addition to its capital, $418,200.00. The Commissioners of Taxes and Assessments in the City of New York had signified their intention of taxing this surplus, and the president of the bank made a statement of its condition. Its capital and surplus were thus shown to be $1,918,200.00, which on a division would make each share $63.63. As the bonds were liable to fluctuation and might slightly exceed the estimate, he made affidavit that the value of each share did not exceed $64.00. Thereupon the commissioners deducted $5.00 per share as the proportion of the assessed value of the bank's real estate, and took $59.00 as a valuation of each share and imposed the tax accordingly. The relator to test the authority of such assessment sued out of the Supreme Court of the state a writ of certiorari, which upon hearing was quashed. It thereupon appealed to the court of appeals where the judgment below was affirmed, and then brought the case to the Supreme Court of the United States.

The court said on page 416:

"The laws of the state of New York provide that shares of stock like those we refer to shall be assessed 'on the value' of the shares, and at 'their full and true value, as they (the assessors) would appraise the same in payment of a just debt due from a solvent debtor,' deducting the proportional value of the real estate owned by the bank." (Citing the New York Statutes.)

"The assessors were justified, under this authority, in fixing the value as we have stated. The appraisement *included the reserve fund, which is as much a part of the property of the bank, and goes to fix the value of shares, equally as if it were not called by that name, but remained as part of the specie, bills discounted, or other funds of the bank, undistinguished from the general mass.*"

"The forty-first section of the act of Congress of June, 1864, provides that the states may tax the shares of national banks, subject to two restrictions: 1st, That this taxation shall not be 'at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state;' and, 2nd, That the taxes so imposed shall not exceed the rate imposed upon the shares of any of the

banks organized under the authority of the state where such association is located. 13 Statute, 112. In Hepburn vs. School Directors, this court decided that, in making assessment of bank shares by this authority, it was competent to assess them at an amount above their par value."

"The surplus fund which a national bank is required to reserve from its net profit is not to be excluded in the valuation of its shares for taxation."

Stafford Nat. Bank. vs. Dover, 58 N. H., 316.
National Bank vs. Newark, 39 N. J. L., 380.

"To include all reserve funds, profits, earnings, and other values."

Bank vs. Papin, 4 Dill., 29.
Bank vs. Covington, 21 Fed. Rep., 489.

Applying the reasoning of the court to the complainant bank, the court will find that in fixing the valuation of the shares of complainant bank *its surplus and undivided profits were not taken into consideration in fixing their value.*

If they had been taken into consideration, the shares instead of being fixed at fifty-five and sixty per cent., would be fixed at about $128.00 per share.

The fact then being plainly before the court of the value of the shares of the complainant bank, it seems to us that the sole question for the court to decide, would be, could the Board of Equalization list said shares at as high a rate as they have done, or even above their par value?

The cases above cited decide that question in the affirmative beyond any dispute.

On the above question see also the case of Stanley vs. Supervisors of Albany, 121 U. S., 435 to 552.

People vs. Assessors of Albany City, 9 Hun., 583 to 591.

We think that it has been conclusively shown by the evidence that there is no discrimination against the shares of said complainant bank, and that the same have been beyond doubt listed far below their true value in money. It might be pertinent to cite here some

authorities upon the proposition as to what exemptions allowed to other forms of capital would not be considered a discrimination under Section 5219, R. S. U. S. Basing this proposition upon the statement made by complainant in its bill, that they have been discriminated against because certain capital invested in building and loan associations, and certain capital invested in savings banks, and certain other forms of capital, are each allowed a deduction of debts from credits, which in the opinion of the complainant amounts to a discrimination.

In the case of Hepburn vs. School Directors, 23 Wallace, 480, and Adams vs. Nashville, 95 U. S., 19, it was held: That the exemptions of all mortgages, judgments, recognizances and moneys owing upon articles of agreement for sale of real estate except for state purposes, did not constitute an unlawful discrimination as against national bank shares.

In the case of People vs. Commissioners, 4 Wallace, 244, a similar question was presented, and the court said:

"The meaning and intent of the law-makers were that the rate of taxation of the shares should be the same, or not greater than upon moneyed capital of the individual citizens which is subject or liable to taxation; that is, no greater proportion or percentage of taxes on the valuation of the shares should be levied than upon other moneyed taxable capital in the hands of citizens. And it was said that it was known as sound policy within every well regulated and enlightened state and government, that certain descriptions of property, and also certain institutions—such as churches, hospitals, academies, seminaries and the like—are exempt from taxation; but these exemptions have never been regarded as disturbing the rates of taxation, even where the fundamental law had declared they should be uniform."

In the case of Lionberger vs. Rouse, 9 Wallace, 468, the question was presented, that, as the state of Missouri, had by a special charter exempted two banks from taxation, that that constituted a discrimination as against the shares of the Third National Bank of St. Louis, the complainant in the action. The court, speaking through Mr. Justice Davis, denied this proposition, and among other things said:

"Without pursuing the subject further, it is enough to say that in our opinion Congress meant no more by the limitation in the National Bank Act, than to require of each state, as a condition to the exercise of the power to tax the shares in national banks, that it should as far as it had the capacity, tax in like manner the shares of banks of issue of its own creation."

In the recent case decided by the Supreme Court of the United States, of the First National Bank of Wellington vs. R. S. Chapman, Treasurer of Lorain County (*Supra*) this court held, *that the banks organized by virtue of the statutes of the State of Ohio were treated in exactly the same manner as regards taxation as were the national banks, and there found that no discrimination existed.*

In the case of Bells Gap R. R. vs. Pennsylvania, 134 U. S., 232 to 237, the question was raised in behalf of citizens of other states, as to the validity of a law of the state of Pennsylvania, which imposed a tax upon the nominal or face value of corporation bonds, instead of a tax upon their actual value; and while it was not a case of taxation of national bank stock, some observations were made by Mr. Justice Bradley in expressing the views of the court, that are applicable to the case before us.

After holding that the various states may impose different specific taxes upon different trades and professions, and may vary the rate upon various products, and may tax real estate and personal property in a different manner, and may tax visible property only and may not tax securities for the payment of money, that it may allow deductions for indebtedness or not allow them, the court then summarized the whole matter by saying:

"We think we are safe in saying that the fourteenth amendment was not intended to compel the state to adopt an iron rule of equal taxation. If that were its proper construction, it would not only supercede all those constitutional provisions and laws of some of the states, whose object is to secure equality of taxation, and which are usually accompanied with qualifications deemed material, but it would render nugatory those discriminations which the best interests of society require, which are necessary for the encouragement of needed and useful industries, and the discouragement of intemper-

ance and vice, and which every state, in one form or another, deems it expedient to adopt."

In the State of Ohio the policy of the law has been to encourage small investors and small savings by the organization of building and loan associations. The amounts invested in building and loan associations, although alleged by the complainant to constitute a material discrimination against the shares of national banks, cannot be so construed, because it has been held that that class of investments, being similar to amounts invested in savings banks, do not constitute a discrimination against national banks shares.

Taft, J., in his opinion, says:

> "It seems to me that building associations are certainly not to be differentiated in their purpose or object or practical effect from savings banks."

In the case of the Mercantile Bank vs. New York, 121 U. S., 138, the court said (quoting from that decision as cited in 166 U. S., 460):

> "*As to savings banks* it was held that, though it could not be denied that their deposits constituted moneyed capital in the hands of individuals, yet it was clear *that they were not within the meaning of the act of Congress in such a sense, as to require, that, if they are exempted from taxation*, shares of stock in national banks must also be exempted; that it was part of the policy of the state to encourage the accumulations of small savings belonging to the industrious and thrifty, and it was within the reasonable exercise of the power of the state to exempt particular kinds of property, and the conclusion of the court, in respect to savings banks, was thus expressed: 'The only limitation, upon deliberate reflection, we now think it necessary to add, is that these exceptions should be founded on just reason, and not operate as an unfriendly discrimination against investments in national bank shares. However large, therefore, may be the amount of moneyed capital in the hands of individuals, in the shape of deposits in such savings banks as now organized, which the policy of the state exempts from taxation for its own purposes, that exemption cannot affect the rule for the taxation of shares in national banks, provided they are taxed at a rate not greater than other moneyed capital in the hands of individual citizens otherwise subject to taxation."

It will be found by an examination of the facts in the last cited

case, that there was property exempt from taxation in the state of New York in excess of $1,800,000,000.00, *and yet the court held that the exemption of that property did not constitute a discrimination against national bank shares, for the reason that at best it was only a partial exemption, and a partial exemption did not constitute a discrimination.*

As regards that portion of paragraph five of complainant's bill of complaint, wherein it is averred that it was the uniform practice of the taxing officers *of counties in the State of Ohio, other than Cuyahoga county,* to assess all classes of investments at 60 per cent. of their true value. We contend that the necessity of considering that question is eliminated by a stipulation made by counsel.

After taking certain depositions on November 14, 1898, by the complainant bank, a stipulation was made and entered into, which is referred to in paragraph 18, of the Finding of Facts (Record, p. 42), as follows:

> "By stipulation signed by the parties to said cause it was agreed that if the court holds it competent to put in proof of taxation of moneyed capital and bank shares, outside of Cuyahoga county, that there is no discrimination for counties outside of the county of Cuyahoga in the State of Ohio, by taxing officers of said counties in fixing the valuations for the purposes of taxation upon moneyed capital as against shares in incorporated banks."

It, therefore, confines the question of alleged discrimination against bank shares to the actual practice of the taxing officers of Cuyahoga county, and upon that question we contend, that instead of there being any discrimination against bank shares in that county, the proof and finding of the Master shows that such investments were favored at least five per cent. above all other moneyed capital.

Of course, the Master did find (17th paragraph, Record, p. 41) that the valuation placed upon the shares of complainant bank was much higher than that paid on other moneyed capital in Cuyahoga county, and constituted an unjust discrimination against complainant. But when that finding is examined, in the light of his other findings, especially paragraph 19, Record, p. 42, it will be

found that the claim of discrimination is not supported; and we are of the opinion, that as between such finding of the Master and the opinion of Taft, J., thereon, (Record, p. 436, top), the reasoning of the court is the better sustained; for to use the court's language,

> "It seems to me that the findings of the Master upon this point, therefore, are inconsistent; and the exception to them must be sustained."

III.

As to the question of notice to complainant bank of the action of the State Board of Equalization.

If the complainant bank had not the right to have its share holders' debts deducted from the value of their bank shares before returning the same for taxation, but the auditor of Cuyahoga county had so permitted them to be deducted; when the State Board of Equalization for bank shares added to the banks' returns a part of the debts, so illegally deducted, and did not give *actual* notice to the bank, it fully complied with the law. The absence of *actual* notice, under such circumstances cannot entitle it to any equitable relief, and proposes merely an academic question whose solution can have no material bearing upon the merits of the cause. As the Circuit Court said:

> "In that view it becomes unimportant to decide, as already stated, whether or not the notice of the action by the State Board of Equalization was sufficient."

But lest this court might take a different view of the question, we contend, that the notice given to the bank by the statute of the time of meeting of the board and its proceedings, is all the notice required.

A resume of the Statutes of Ohio bearing upon the question of the procedure necessary to be observed to list and equalize bank shares follows:

Section 2762, R. S. of Ohio, provides that all the shares of the stockholders in any incorporated bank shall be listed at their true value in money, and taxed in the city, ward, or village where such bank is located, and not elsewhere.

Section 2765 provides that the cashier shall make out and return to the county auditor, between the first and second Monday of May, a return, exhibiting in detail and under appropriate heads, the resources and liabilities of such bank at the close of business on the Wednesday next preceding the second Monday of May, together with a full statement of the names and residences of the stockholders therein, with the number of shares held by each, and the par value of each share.

Section 2766 provides that, upon receiving such report the county auditor shall fix the total value of the shares of such bank according to the true value in money, and from the aggregate make a deduction for the value of the real estate, as it stands on the duplicate, and thereupon he shall make out and transmit to the annual State Board of Equalization of Incorporated Banks, a copy of the report so made by the cashier, together with the value of such shares so fixed by him as auditor.

Section 2808 provides that the governor, auditor of state and attorney general shall constitute a Board of Equalization of the Shares of Incorporated Banks, and for this purpose they shall meet on the third Tuesday of June, annually, at the office of the auditor of state, and examine the returns of said banks to the county auditors and the value of said shares as fixed by the county auditors, as the same shall have been reported by the county auditors to the state auditor.

Section 2809 defines the powers of this board and says that they shall hear complaints and equalize the value of said shares according to the rules prescribed by this title for valuing and equalizing the values of real and personal property, and in addition to this power the board has the right to raise the aggregate value of the shares, subject to the limitation that they shall not increase or reduce the grand aggregate value of bank shares by more than 20 percentum.

Section 2810 provides that the auditor of state shall, forthwith after such equalization shall have been made, certify the valuations to the auditors of the proper counties and that the same shall be put upon the tax list.

It being proven by the evidence that the members of the State Board of Equalization of Bank Shares met at the *proper place*, to wit, at the office of the auditor of state, and at the *proper time*, that is, on the third Tuesday of June. There is contained in said petition no averment that this plaintiff was at the *proper place* at the *proper time*, to make any complaint relative to the valuation as fixed upon its shares, but on the contrary the evidence shows the parties were not there.

In order to get a correct understanding of the powers and duties of the State Board for the Equalization of the Shares of Incorporated Banks, it is interesting and absolutely necessary that we examine the history of this legislation.

For many years, while it was provided that banks should make a return to the county auditor, still, there was no provision for equalizing the values of said shares, and it was not until April 12, 1876, (73 O. L., 251), that this board was created. Since that time the board has been composed of the same officers, their place of meeting has been the same, that is, at the office of the auditor of state, and the time for meeting has been at the same time, to wit, on the third Tuesday of June, except a period of three years from 1880 to 1883, during which time the State Board of Equalization had the power to equalize the value of the shares of incorporated banks. But on March 9, 1883, the original sections as they now appear, providing for the annual State Board of Equalization for Incorporated Banks, were enacted.

(1) *Our contention is that no other notice was required, or was necessary beyond the statutory notice, fixing the time and place of the meeting of this board.* While a great deal may be said about due process of law and the necessity of notice, still, we contend that in such proceedings no other notice was required than the one given by statute.

In the case of Glennet et al. Exrs. vs. Raine, Auditor (30 Bull., 30), speaking of the authority of Boards of Equalization, Judge Hunt says:

"No provisions of the law exist requiring the board to notify the owner that it is about to take such action. The law itself is notice that the board is charged with that duty, and will perform it. The fact of the erection of new structures by the plaintiff, and the duty imposed by the law on the board to review the valuation of the assessors at the regular meeting, is all the notice the law deems necessary in the matter."

In a decision rendered in 1851, Judge Spalding, in the case of Hambleton vs. Dempsey, 20 O., 168, on page 173, says:

"It is objected that the taxpayer had no notice of the action of the board, and that it nowhere appears affirmatively, that they acted upon evidence of an undervaluation of the property. The law fixes the time of meeting and the place, to wit, the second Monday in April, annually, and at the auditor's office. This is notice to every citizen who has property, real or personal, returned for taxation."

This case is one of the earliest expressions of our Supreme Court upon the authority of the Board of Equalization, and has never been overruled or even distinguished or criticized in any decision since that time.

In this case the plaintiff had made a return for taxation and had notice of the place of meeting as well as the time of meeting of the State Board, and nowhere is it averred in the petition that he sought in any way to object to the estimate, or to make any complaint or to furnish any additional information to the board beyond what was contained in the original return as made to the county auditor.

Desty on Taxation, page 599, says:

"All parties are bound to take notice of the day of the meeting of the commission, when the day is appointed by law; and under the general notice, parties must attend the meetings as they would the session of a court until their estimate is passed upon, and when once this is done no change can afterwards be made without special notice."

On page 601 the same author says:

"The proceeding being judicial, the law must provide some kind of notice and opportunity to be held before the proceedings become final, or they will want the essential ingredient of due process of law. It may be given by personal citation, *or by statute; it is usually given by statute* prescribing a time and place where parties may be heard."

In Wagoner vs. Loomis (37 O. S., 571), on page 582, Judge McIlvaine says:

> "Our statutes have made ample provision for the correction of mistakes and errors of judgment, committed by those intrusted, in the first instance, with the fixing of values upon taxable property. Even unjust and corrupt discrimination can be relieved against, in the special tribunals provided by the statute, for the equalization of values. As a general rule, the decisions of these boards must be held to be final and conclusive."

Black on Tax Titles, Section 131, says:

> "As we have just stated, notice to the taxpayer is a constitutional requisite before the assessment is final and definitely made a charge upon him, but if the statute does not expressly require a personal notice to be given, it becomes a question what kind or degree of notice will be sufficient to satisfy the constitutional requirement of due process of law."

The author instances Nebraska and California as requiring actual notice, and then states:

> *"But in all other states, as far as we have been able to discover, the doctrine prevails that if a public statute, of which all persons are bound to take notice, sufficiently states the day and place when the Board of Equalization meets, and persons affected by their action cannot complain that such action was taken without notice to him."*

In Adler vs. Whitbeck (44 O. S., 573), the court says, that

> "When the party has a chance to be heard before the officer appointed to make the assessment and return, he cannot be heard to say that he has been injured in his property, without due process of law, because no mode of appeal is provided."

In the case of Hager vs. Reclamation District 108 (111 U. S., 701), on page 710, the court says:

> "The officers, in estimating the value of property act judicially; and in most of the states provisions are made for the correction of errors committed by them through a board of revision or equalization, sitting at designated periods provided by law, to hear complaints, respecting the justice of the assessments. *The law in prescribing the time when such complaints will be heard, gives all the notice required*, and the proceeding by which the valuation is determined, though it may be followed if the tax be not paid, by a sale of the delinquents' property, is due process of law."

In The Merchants' Bank vs. Pennsylvania (167 U. S., 461), on page 466, the court says:

> "The final objection is that there is a lack of due process of law, in that the property of the shareholders is subject to an advalorem tax without an opportunity being given to them to be heard as to the value. *It is true that the statute contemplates no personal notice to the shareholder, but that has never been considered an essential to due process in respect to taxation.* The statute defines the time when the bank shall make its report to the auditor general, and it specifically directs him to hear any stockholder who may desire to be heard. The statute therefore fixes the time and place, for official proceedings are always, in the absence of express provisions to the contrary, to be had at the office of the officer charged with the duties; and a notice to all property holders of the time and place at which the assessment is to be made is all that "due process" requires in respect to the matter of notice in tax proceedings."

In the case of State ex. rel. vs. Jones, Auditor, 51 O. S., 492, the Supreme Court of Ohio said (quoting from pages 514 and 515):

> "The law itself states the time when the board shall meet, and the express company could not ignore the time of meeting. The meetings of the board are not secret, and the company had the right to be present and explain the statement rendered of its property and the value thereof. Indeed without notice from the board, *or by the terms of the law*, the company would have been unable to make the return prescribed by the statute. And of the company's return, it may be said, in the language of the opinion in the Kentucky Railroad Tax Cases, 115 U. S., 321: 'This return, made by the corporation through its officers, is the statement of its own case, in all the particulars that enter into the question of the value of its taxable property and may be verified and fortified by such explanations and proofs as it may see fit to insert.' "

In the case of Palmer vs. McMahon, 133 U. S., p. 660, the court said:

> "Assessors should give all persons taxed an opportunity to be heard; but it is sufficient if the law provides for a Board of Revision, authorized to hear complaints respecting the justice of the assessment, *and prescribes the time during which, and the place where, such complaints may be made.*"

(2) It being conceded that the statutory notice in this case was sufficient notice of the time and place of the meeting of the State

Board for the Equalization of Bank Shares, it is contended that because of some adjournments the board lost its jurisdiction, and that a new notice would be necessary in order that it might proceed and perform the duties required of the board under the section to which we have referred.

The place where the meeting of this board must be held is fixed, and this board can meet at no other place, without notice to those affected. The place where the meetings are held and have been held, is at the office of the auditor of State, and he is a member of that board.

There is no averment in the petition that this plaintiff was at the place of meeting of this board, or that it made any attempt to attend the meeting held on the third Tuesday of June, or that it ever applied to know to when the adjournments of the board were made. The office of the auditor of state is a public office, open at all proper times, and there is no averment, nor is it a fact, that this plaintiff, nor any one representing it, ever appeared at the place designated for meeting of this board, at the time prescribed in the statute for the first meeting, and not until the board had finally adjourned, did they appear. We contend that this plaintiff is now estopped by reason of its own default.

In Gager, Treas., vs. Prout et al. (48 O. S., 89), on page 111, the court says:

> "Having had notice of the commencement of the proceeding the law charged them with notice of what thereafter was done, and it became their duty to pay the taxes charged upon the addition as other taxes."

Upon this point of lack of notice, the cases known as the "State Railroad Tax" cases, 92 U. S., quoting from p. 609, is very much in point. In that case the Supreme Court said the statute

> "Requires the proper officers of the railroad companies to furnish to the state auditor a schedule of the various elements already mentioned as necessary in applying the statutory rule of valuation. It is charged that the Board of Equalization increased the estimates of value so reported to the auditor, *without notice to the companies*, and without sufficient evidence that

it ought to be done; *and it is strenuously urge: upon us, that for want of this notice the whole assessment of the property and levy of taxes is void.*

"It is hard to believe that such a proposition can be seriously made. If the increased valuation of property by the board without notice is void, it is also void as to every other owner of property in the state, when the value assessed upon it by the local assessor has been increased by the Board of Equalization. How much tax would thus be rendered void it is impossible to say. The main function of this board is to equalize these assessments over the whole state. If they find that a county has had its property assessed too high in reference to the general standard, they may reduce its valuation; if it has been fixed too low, they may raise it to that standard. When they raise it in any county, they necessarily raise it on the property of every individual who owns any in that county. Must each of these have notice and a separate hearing? If a railroad company is by law entitled to such notice, surely every individual is equally entitled to it. Yet if this be so,the expense of giving notice, the delay of hearing each individual, would render the exercise of the main function of this board impossible. The very moment you come to apply to the individual the right claimed by the corporation in this case, its absurdity is apparent. Nor is there any hardship in the matter. *This board has its time of sitting fixed by law. Its sessions are not secret. No obstruction exists to the appearance of any one before it to assert a right, or redress a wrong; and, in the business of assessing taxes, this is all that can be reasonably asked.*

"As we do not know on what evidence the board acted in regard to these railroads, or whether they did not act on knowledge which they possessed themselves, and as all valuation of property is more or less matter of opinion, we see no reason why the opinion of this court, or of the Circuit Court, should be better, or should be substituted for that of the board, whose opinion the law has declared to be the one to govern in the matter."

See also Railway Co. vs. Backus, 154 U. S., 421.

As the appellant has heretofore cited in its brief, the case of Kuntz vs. Sumption, 117 Ind., 1; we cite what the Supreme Court of Indiana, in the later case of Hyland, Auditor, vs. The Brazil Block Coal Co., 128 Ind., 340, said of that case:

"If notice is provided, and it is of such a character as to inform the taxpayer that his lists will be revised, and to give

him a reasonable opportunity to be heard, the constitutional requirement is met. We think there was such notice in this case. *The time for the meeting of the board is fixed by law, so that all interested must take notice.* The duties of the board are also fixed by law, so that all are bound to know what those duties are. * * *

"It is evident it could not be ignorant of the fact that its property would be valued and assessed by the Board of Equalization, for a public law made it the duty of the appellee to furnish a statement for consideration by the board, and also made it the duty of the board to make the assessment. The case is entirely unlike that of an individual taxpayer, for he can not know that the board will take any action upon his list, whereas the corporation knows, as matter of law, that the board will act upon its statement, since that is the principal purpose for which the sworn statement is required. *It is manifest that neither the principle decided in Kuntz vs. Sumption, supra, nor the line of reasoning there pursued, is relevant to the question here present.*"

In P., C., C. & St. L. Ry. Co. vs. Backus, Treas., 133 Ind., 626, the Supreme Court of that state, said:

"The law having required the owners of 'railroad track' and 'rolling stock' to file with the auditor of state a schedule of the same and the value thereof, and having made it the duty of the auditor of state to present such schedule to the State Board of Tax Commissioners, *and having fixed a time for the meeting of such board, the owners of such railway property are bound to take notice of the time of the meeting of such board, and are entitled to no other notice.* And the owners of such property, through their written schedules and statement of values, are heard by such board, and to be further heard they must take notice of, and be present at, the sitting of such board, and make a proper showing."

In Newton vs. Roper et al., 150 Ind., 632, the rule was again restated, as follows:

"While notice is essential to the due process of law, it is not essential to the validity of every step in a proceeding, judicial or *quasi* judicial, that special notice be given as each step is to be taken. The assessment and enforcement of taxes must be by methods necessarily summary, and without the detail of judicial tribunals. With reference to the assessment of property for taxation, it has been held that there is due process of law when the law has prescribed the time, the place, and the tribunal when, where, and by which assessments are to be made."

In Cooley on Taxation, pp. 364-365, it is said:

> "It is not customary to provide that the taxpayer shall be heard before the assessment is made, except where a list is called for from him: but a hearing is given afterward, either before the assessors themselves or before some court or board of review."

That is just what is provided for by the Ohio Statutes. The banks, through the cashier, is required by the law to submit a return to the county auditor, and he to submit it to the State Board, and they authorize a hearing before the State Board. As regards notice of the meeting of the State Board before a hearing may be had, the author, in the same section continuing, says:

> "And of the meeting of that court or board the taxpayer must in some manner be informed, either by personal notice * * * which is reasonably certain to reach him, or *which is equivalent, by some general law which fixes the time and place of meeting, and of which he must take notice.* The last is a common method of bringing the assessment to the notice of the taxpayer, and it is perhaps the best of all, because it comes to be generally understood and is remembered."

In Sanford vs. Poe, 69 Fed. Rep., 552-553, this court said:

> "There is no ground for complaint that the assessments were made without due process of law. The complainants had notice of the time and place where the board would meet, and were required to make a sworn return of their property. *The time and place were fixed by the law, and its sessions were not secret.*"

Second—But, recurring to the other question involved in this branch of the decision, how has the complainant bank been damaged by any lack of notice to it? It has not been overvalued, and if notice had been served upon it, there is no averment made in the bill that the result would have been any different. Will equity require a vain thing to be done?

Upon this subject the Circuit Court said:

> "This proceeding is a bill in equity to enjoin the collection of the tax, on the ground that it was assessed without due notice to the complainant. If the tax assessed is no greater than ought to have been assessed, then the complainant is not in a position to ask the intervention of a court of equity, because, however irregular the action of the State Board may

> have been if the complainant can't make it clear that, by a hearing upon notice, it would have been entitled to an assessment less than that which was made, the bill must be dismissed."

As it is conclusively shown by the testimony, and incorporated in the nineteenth finding of fact by the Special Master, that the actual value of complainant's shares were at the time in question $128.00 per share, a computation made upon that basis, after deducting the value of the bank's real estate, will show that the complainant's shares are not compelled to bear a greater rate than is other moneyed capital. This being true the tax should not be enjoined. If, as is claimed by the complainant, the Board for the Equalization of the Shares of Incorporated Banks erred in not giving actual notice to the bank, in addition to the statutory notice, it would only be an irregularity or informality in the process of equalization; and if the amount of the valuation as fixed by the board was just in proportion to other moneyed capital, although informal or irregular, no injustice can be said to have been done to the complainant, and it should not be permitted to enjoin the collection of the tax.

We need not cite to this court the numerous decisions of the Supreme Court of the United States which have held that an injunction to restrain the collection of a tax, on the ground of the illegality of the tax, or informality in its assessment, cannot be maintained. Also that irregularities and informalities are no ground for equitable interference. That an injunction will not issue on account of irregularities in the matter of notice of time and place; nor for an error of judgment on the part of officers in fixing valuations. The mere statement to this court without the citation of any authorities is sufficient.

Some special ground for equitable interference must be shown by the pleadings. (11 Wall, 109.) This, we admit, the complainant has attempted to do; and so far as the allegations of the bill of complaint is concerned, we admit that the complainant has brought itself fairly within the rule laid down in Cummings vs. National Bank, 101 U. S., 153, and many subsequent cases.

But the entire failure of proof to support such allegations is noticeable. When we take the report of the Master and the evidence, we plainly see that the amount of the valuation of complainant's shares is at least $50,000.00 too low, as compared with the valuation of other moneyed capital, and complainant, finding this to be true, is compelled to fall back upon the claim of the alleged illegal or informal action of the State Board, and the plea of *res judicata* to sustain it herein.

Is it not true, as said by the Supreme Court of Ohio, in a recent case (58 O. S., 414):

> "The obligation of the citizen to pay his taxes is regarded as a continuing public duty which is discharged only by their payment."

The complainant has tendered portion of its tax, viz., taxes *upon the valuation as made by itself* returned to the auditor of the county. But when the Board of Equalization raised the valuation of the bank, and raised it to somewhere near its true valuation, the excess is resisted by the complainant. Until it is paid, the duty of the bank is not discharged. It has shown no ground for equitable relief, for "to entitle a party to relief in equity it must clearly appear that he ought not to be required to pay the taxes from which relief is sought."

Desty on Taxation, p. 675.
Conway vs. Younkin, 28 Iowa, 298.
Warden et al. vs. Supervisors, etc., 14 Wis., 618.

> "It is no ground for equitable interference, that the rule of taxation followed in the levy and assessment of taxes was not equal and uniform, if the taxes imposed upon plaintiff's property were less than they would have been if the constitutional rule had been pursued."

Miltimore vs. Supervisors, 15 Wis., 9.

In view of the proven facts, how could the Circuit Court have found differently than it did? There were no irregularities or informalities in the action of the taxing or equalizing boards or officers, that deprived the bank of any of its rights; and upon examination of the true value of its shares, we find no injustice was done

it, and no reason can possibly be found why the action of the board should be enjoined.

In South Platte Co. vs. City of Crete, 11 Neb., 347, one of the grounds of complaint against the taxes was that, "the said city council never sat as a Board of Equalization," and that in consequence of not doing so, that "plaintiff had no opportunity to appear and show that said pretended assessment was too high." But the court said the mere "opportunity" to appear and make such showing would have been of no benefit unless the valuation was relatively too high." Injunction was refused; case dismissed.

In McIntyre vs. White Creek & Co., 43 Wis., 620, 626, that court said:

> "The remaining fact which invalidates the proceedings of the Board of Review, requires but a brief consideration. The law of 1871 contains the proviso. "And provided further, that in all cases, if said board shall raise the amount of such assessment on any property, the owner thereof, if a resident of such town, shall be duly notified of such intention in time, that such owner may be heard before such board in relation to the value thereof."
>
> "*If the plaintiff was not so notified (and whether he was or not it is unnecessary to determine) the omission was in no sense jurisdictional.* It did not go to the groundwork of the tax, but was a mere irregularity, unavailable in a Court of Equity to avoid the tax, *unless it worked a substantial injustice to the plaintiff.*"
>
> Marsh vs. Supervisors, 42 Wis., 502.

"But it resulted in no such injustice, for it is a verity in the case that the valuation of the plaintiff's property fixed by the board was not in excess of its actual value, or of its proportionate value compared with the valuations of the other real estate in the town.

It follows that the proceedings of the Board of Review in raising the valuations of plaintiff's property, are valid. Complaint dismissed."

To the same effect as the above are the following:

> Commissioners vs. Armstrong, 91 Ind., 528.
> Durham vs. The Commissioners, 95 Ind., 182.
> Commissioners vs. Graham, 98 Ind., 279.
> Commissioners vs. Nettleton, 22 Minn., 356.

"And certainly, in justice or reason, a party cannot complain that, when he objects to a tax on the ground of some omission or irregularity in matters of form, he is required to show that he was prejudiced."

Winona, etc., Land Co. vs. Minn., 159 U. S., p. 537.

IV.

The claim of res judicata.

In City of New Orleans et al. vs. Citizens' Bank of Louisiana, 167 U. S., 371, the court says:

"A decision that the tax for a certain year is void because the property is exempt is *res judicata* as to the tax of a subsequent year when the *same question* of exemption is presented *on the same facts.*"

The plaintiff invokes the application of this decision to the case at bar, claiming that the same question was decided by the Supreme Court of the United States in the case of Whitbeck vs. Mercantile National Bank of Cleveland, Ohio, 127 U. S., 193.

We concede that if the issues of law and fact in the Whitbeck case were the same as in the case at bar, then the matter adjudicated in the Whitbeck case is *res judicata* as to the case at bar.

People ex rel. Warren et al. vs. Carter et al., 119 N. Y., 557.

A question is *res judicata* when a court having jurisdiction has finally adjudicated upon the merits of the whole controversy.

If the same question is again brought before the court the answer is that that question has been decided.

But if the question is different, if the issues of fact and law are not the same, there is no *res judicata.*

We propose to show that the matter adjudicated in the Whitbeck case differs from the question to be decided in this case.

In the Whitbeck case the court said:

"The auditor of Cuyahoga county, Ohio, fixed the taxable value of shares in a national bank at 60 per cent. of their true value in money, in accordance with the practice adopted for the valuation of other moneyed capital of individuals in the county and state, and transmitted the same to the State Board of Equalization for incorporated banks. The board increased the

valuation to 65 per cent., and this value being certified back to the auditor, was placed by him on the tax list without a corresponding change being made in the valuation of other moneyed capital of individuals. Held, that this was such a discrimination as is forbidden by Sec. 5219 of the Revised Statutes of the United States.

"The statutes of Ohio regulating assessments for taxation *allow an owner of moneyed capital other than shares in a national bank to have a deduction* equal to his bona fide indebtedness made from the amount of the assessment of the value *of such moneyed capital;* but they make no provision for a similar deduction from the assessed value of shares in a national bank, and provide no means by which such a deduction may be obtained. Held:

(1) That the owners of such shares are entitled to have a deduction of their indebtedness made from its assessed value *as in the case of other moneyed capital;* and

(2) That the right to it is not lost by not making a demand for it until the entire process of the appraisement and equalization of the value of the shares for taxation is completed, and the tax duplicate is delivered to the treasurer for collection. The law of Ohio regulating the taxation of shares in national banks considered."

In delivering the opinion of the court, Miller, J., says:

"Another point made by the bill was, that while the statutes of Ohio *permit the taxpayer owning moneyed capital* subject to taxation to make a deduction, from the amount of his bona fide indebtedness, no such provision is made in regard to the indebtedness of any holder of bank stock. The bill sets up as affected by this proposition the names of certain shareholders of the plaintiff bank, who claim that they should be allowed this deduction for their indebtedness upon the taxable value of their bank shares. * * *

"In regard to the deduction of their bona fide indebtedness, claimed on the part of certain owners of shares in the plaintiff bank from the assessment levied upon such shares, the court finds that no demand was made therefor, either by the complainant or by any of its shareholders until the seventeenth day of December, A. D. 1885, a date prior to the commencement of this action, at which time the entire process of the appraisement and equalization of the value of said shares for taxation had been completed, and the tax duplicate for said year had been delivered in accordance with law to the treasurer of said county for the collection of said taxes; but the laws of Ohio make no provisions for the deduction of the bona fide indebtedness of

any shareholder from the shares of his stock and provide no means by which said deduction can be secured.

"Under the decision of Hills vs. Exchange Bank, 105 U. S., 319, we are of opinion that the bank was entitled to relief in the cases of all the shareholders named in the bill (except James A. Barnett, Robert L. Chamberlain and James Parmelee), and that the fact that they did not make an earlier demand for the deduction of their indebtedness from the assessed value of the shares of their bank stock does not defeat their right to have it made by this bill in chancery, for the reason that the court expressly finds that the laws of Ohio make no provision for the deduction of the bona fide indebtedness of any shareholder from the shares of his stock and provide no means by which said deduction can be secured."

Whether the court was mistaken as a matter of fact in reciting the statutes, and upon such mistake formulated the rule laid down in that case, as set forth in the second syllabus, or whether the court had before it a statute reading in all respects as stated in the opinion, in either view of the case that decision would not apply to the case at bar as *res judicata*, for the reason that it did not fall within the rule laid down in City of New Orleans et al. vs. Bank of Louisiana above cited.

The court in that case say a decision as to an exemption for a certain year is *res judicata* as to the tax of a subsequent year when *the same* question of exemption is presented on the *same facts*.

Of course if the question in the case to be decided arose from a different statute or a different state of facts the decision in the first case would not be *res judicata* as to the last case.

In Whitbeck vs. Mercantile Bank the court based its decision upon a statute, or a *supposed* statute, different from the statute under which the plaintiff was required to list its property for taxation when the return was made which is the subject matter of this suit.

So that the court can see at a glance that the questions presented in the two cases are not the same we print in opposite columns the statutes ruled upon in the Whitbeck case and the statutes to be ruled upon in the case at bar.

STATUTE IN WHITBECK CASE AS STATED IN 127 U. S., 193. 2d. Syl.

"The statutes of Ohio regulating assessments for taxation *allow an owner of moneyed capital* other than shares in a national bank *to have a deduction equal to his bona fide indebtedness made from the amount of the assessment, of the value of such moneyed capital*; but they make no provision for a similar deduction from the assessed value of shares in a national bank, and provide no means by which such a deduction may be obtained."

STATUTE UNDER WHICH THE CASE AT BAR IS TO BE DECIDED.

Part of Sec. 2730 R. S. of Ohio.

The term "credits" shall be held to mean the excess of the sum of all legal claims and demands whether for money or other valuable thing, or for labor or service due, or to become due, to the person liable to pay taxes thereon, including deposits, in banks, or with persons in or out of this state, other than such as are held to be money, as hereinbefore defined, when added together (estimating every such claim or demand at its true value in money) *over and above the sum of legal bona fide debts owing by such person*; but in making up the sum of such debts owing there shall be taken into account no obligation to any mutual insurance company, nor any unpaid subscription to the capital stock of any joint stock company, nor any subscription for any religious, scientific, literary, or charitable purpose; nor any acknowledgment of any indebtedness unless founded on some consideration actually received and believed at the time of making such acknowledgment to be a full consideration therefor; nor any acknowledgment made for the purpose of diminishing the amount of credits to be listed for taxation; nor any greater amount or portion of any liability as surety, than the person required to make the statement of such credits believes that such surety is in equity bound and will be compelled to pay, or to contribute, in case there be no secureties; provided, that pensions receivable from the United States shall not be held to be credits; and no person shall be required to take into account in making up the amount of credits a greater portion of any credits than he believes will be received or can be collected, or any greater portion of any obligation given to secure the payment of rent than the amount that shall have accrued on any lease, and remain unpaid.

The statute applicable to the case at bar has been construed by the Supreme Court of this state in the case of Chapman vs. National Bank of Wellington, Ohio, 56 O. S., 310.

That case was taken on error to the Supreme Court of the United States, 173 U. S., 205, and the judgment of the Supreme Court of this state was affirmed.

In delivering the opinion of the court, Peckham, J., in his statement of the case says:

> "The complaint is founded upon the allegation that the owners of what is termed credits in the law of Ohio (Rev. Stat., Sec. 2730) are permitted to *deduct certain kinds of their debts from the total amount of their credits*, and such owners are assessed upon the balance only, while no such right is given to owners of shares in national banks. The claim is that shares in national banks should be treated the *same as credits*, and their owners permitted to deduct their debts from the valuation. The *owners of property other than credits are not permitted to deduct their debts from the valuation of that property.*
>
> "It is also claimed that there is an unfavorable discrimination against the national bank shareholder and in favor of an unincorporated bank or banker.
>
> "At the outset it is plain that the system of taxation adopted in Ohio was not intended to be unfriendly to or to discriminate against the owners of shares in national banks for, as observed by the State Supreme Court, that system was adopted long prior to the passage of the law by congress providing for the incorporation of national banks. *Under this system the owner of shares in national banks is taxed precisely like the owners of shares in incorporated state banks.* Rev. Stats. Ohio, Sec. 2762."

It will be seen from this statement of the case that the complaint of the First National Bank of Wellington was identical with the complaint of the plaintiff in the case at bar. The Supreme Court of Ohio and the Supreme Court of the United States were called upon to construe the very statute which this court is now again called upon to construe. Upon the complaint as stated the court held:

> "The system of taxation adopted in Ohio was not intended to be unfriendly to, or to discriminate against owners of shares in national banks, and, in its *practical operation* it does not materially do so; and there is nothing upon the face of these statutes which shows such discrimination.

> "The term 'moneyed capital' in the act of congress fixing limits to state taxation on investments in national banks, Rev. Stat., Sec. 5219, does not include capital which does not come into competition with the business of national banks, and exemptions from taxation, made for reasons of public policy, and not as an unfriendly discrimination against investments in national bank shares, cannot be regarded as forbidden by those statutes."

It appears that counsel for the First National Bank of Wellington, in the Chapman case, claimed that the specific question involved in that case had been decided in the Whitbeck case.

But both the Supreme Court of Ohio and the Supreme Court of the United States denied the claim. Both courts base their decisions upon a construction of the same sections of the statute of this state, reciting them, and they are the same sections which this court is now asked to hold constitutes the basis of the judgment in the Whitbeck case.

We have shown that the court in the Whitbeck case found the statute of this state, relative to the taxation of bank property, to be as stated in the opinion of the court, *and found it as one of the facts in the case.*

We do not know from what source of information the court so found. Certain it is there is no such statute in force now.

If the court was mistaken as to the fact, this court, as a Court of Equity, will not go out of its way to confirm the mistake. Courts of Equity correct mistakes. There is no dispute as to what the law is. There is no dispute as to the construction given it by the Supreme Court of this state, and the Supreme Court of the United States, but still counsel for the bank ask this court to ignore the facts and adopt the mistake of the court in the Whitbeck case, and to base the decision of the case upon that mistake.

If the court made a mistake in finding the facts in the Whitbeck case, that finding is just as binding upon the plaintiff as it is upon the defendant.

If the supposed statute upon which the court based its decision in that case had no existence in fact, such fact erroneously found is as

binding upon the plaintiff as it desires to make the judgment based thereon binding upon us. *The plaintiff cannot adopt the judgment and repudiate the grounds upon which it is based.*

The facts upon which it is based are not the facts in the case at bar. We are claiming under a different statute than that upon which the court founded its decision in the Whitbeck case. The facts are different and there is no *res judicata.*

Cromwell vs. County of Sac., 94 U. S., 351.

We wish to especially call the court's attention to what the Supreme Court of Ohio said in the Chapman case about this same plea of *res judicata*, and why they refused to follow it as announced in the Whitbeck case.

56 O. S., 325.

"But it is said by counsel for the bank, that the question is res judicata, and has been determined and settled by the Supreme Court of the United States in Whitbeck vs. Mercantile National Bank of Cleveland, 127 U. S., 193.

The part of the syllabus on this subject is as follows:

" 'The statutes of Ohio regulating assessments for taxation allow an owner of moneyed capital, other than shares in a National bank, to have a deduction equal to his bona fide indebtedness, made from the amount of the assessment of the value of such moneyed capital; but they make no provision for a similar deduction from the assessed value of shares in a National bank, and provide no means by which such a deduction may be obtained. Held: That the owners of such shares are entitled to have a deduction of their indebtedness made from its assessed value as in the case of other moneyed capital.'

"That holding was right, if the Statute of Ohio were as recited. But, as already shown, the Statutes of Ohio do not allow a deduction equal to the bona fide debts to be made from the amount of the assessments of the value of moneyed capital in general, but only from a small and comparative insignificant amount of moneyed capital called 'credits,' and even from credits, only a certain and limited class of debts. If the court had recited in the syllabus, as a predicate for its holding, the provisions of the Ohio Statute as they really are, the holding would most likely have been different, and would have been as in First National Bank of Garnett vs. Ayers, 160 U. S., 660, in which the syllabus is as follows:

"'The single fact that the Statutes of Kansas regulating the assessment and taxation of shares in National banks permit some debts to be deducted from some moneyed capital, but not from that which is invested in the shares of National banks, is not sufficient to show that the amount of moneyed capital in the State of Kansas from which debts may be deducted, as compared with the moneyed capital invested in shares of National banks, is so large and substantial as to amount to an illegal discrimination against National bank shareholders, in violation of the provisions of Revised Statutes, Section 5219.'

"No examination of the provision of the Ohio Statute by the Court is found in the opinion in the Whitbeck case, except as to the procedure in demanding the deduction, and even as to that there is no examination shown by the court, but the finding of the Circuit Court is accepted as to such provisions.

"The sections of the Kansas Statute under review in the Ayers case, are almost identical with Sections 2730 and 2737 of our own state, and it would seem that the facts being the same, the same construction should obtain as to each.

"In the Whitbeck case it is assumed by the court, or at least recited in effect, that the Statutes of Ohio are in substance the same as the Statutes of New York, and permit a deduction of debts from the total amount of personal property, and Hills vs. Exchange Bank, 105 U. S., 319, is cited as authority for the holding. But turning to that case, we find that the principle upon which it was decided is, that the shareholders were not allowed to deduct their debts from their shares, while other parties were allowed to deduct their debts from the total amount of their personal property, and the case is founded upon Supervisors vs. Stanley, 105 U. S., 305, decided at the same time, and in that case the Statute of New York is set out, and shows that the owners of all personal property other than National bank shares, are allowed to deduct their debts from the total amount of their personal property.

"If our statute contained that provision, it would be conceded at once that the holders of National bank shares should be accorded the same right; but they contain no such provision, and therefore it seems only proper that the question should again be presented to, and considered by the Supreme Court of the United States."

The above is the reasoning of the Supreme Court of Ohio as to why the decision in the Whitbeck case was not considered *res judicata* upon this question. This position was followed and shown to be correct by this court in the same case when prosecuted here. We cite from Volume 173 U. S., pp. 219-220:

"It is stated, however, that this specific question has been otherwise decided in Whitbeck vs. Mercantile National Bank of Cleveland, 127 U. S., 193. *If this were true, we should be guided by and follow that decision.* Upon an examination of the case it is seen that the court gave chief attention to the question whether an increase in the value of the shares in National banks, made by the State Board of Equalization, from 60 per cent. of their true value in money, as fixed by the auditor of Cuyahoga county, to 65 per cent., as fixed by the board (other property being valued at only 60 per cent.), amounted to such a discrimination in the taxation of the shareholders of such banks as is forbidden by the Federal Statute. It was held that it did.

"Coming to the question of the deduction of the bona fide indebtedness of shareholders, *the court assumed, that under the Statute of Ohio owners of* ALL *moneyed capital,* other than shares in a national bank, were permitted to deduct their bona fide indebtedness *from the value of their moneyed capital,* but that no provision for a similar deduction was made in regard to the owners of shares in a national bank, and it was held that the owners of such shares were entitled to a deduction of their indebtedness from the assessed value of the shares as in the case of other moneyed capital. The point to which the court chiefly directed its attention related to the question whether a timely demand had been made for such deduction of indebtedness. It was held that it was made in time, for the reason that the court below expressly found that 'the laws of Ohio make no provision for the deduction of the bona fide indebtedness of any shareholder from the shares of his stock, and provide no means by which such deduction could be secured.' As a demand at an earlier period would have been useless, the court held it unnecessary.

"*An examination of the Statutes of Ohio in regard to taxation shows that debts can only be deducted from credits, and how much of credits is moneyed capital is unknown. The case is not authority adverse to the principle we now hold.*"

Thus, it is shown both by the Supreme Court of Ohio, and by the Supreme Court of the United States, that the latter court "assumed that under the Statute of Ohio owners of all moneyed capital other than shares in a national bank were permitted to deduct their bona fide indebtedness from the value of their moneyed capital." But upon examination "of the Statutes of

Ohio in regard to taxation they show that debts can only be deducted from credits." Thus the decision in the Whitbeck case was decided upon an erroneous assumption of what the Statutes of Ohio permitted with regard to the deduction of liabilities from credits, and it can therefore not be claimed to be res judicata of a claim arising under a statute differently worded and to which the Supreme Court of the United States has applied a different construction in the Chapman case, as above cited.

As the Supreme Court of the United States said in the case of K. & W. Ry. vs. Mo., 152 U. S., on p. 316:

> "It could never be tolerated that the state should be forever barred in its collection of taxes by an erroneous decision."

In this connection I desire to quote from the opinion of the learned Circuit Court the portion thereof that has special reference to this plea of res adjudicata, which is as follows:

"There remains to be considered the question arising under the claim of former adjudication made in this bill. Upon the argument, and before I had made a close examination of the bill, my impression was that upon this claim of former adjudication the complainant must succeed. It seemed to me that the adjudication in the former case was a mere adjudication of the necessary operation of the statute of Ohio to discriminate against national banks, and, therefore, that that question having been in judgment between the same parties, it must receive the same adjudication here. Looking into the bill, however, in the former case, and after an examination of National Bank of Wellington vs. Chapman, supra, I find that, in order to support the averments of the bill, it was necessary in that case for the complainant to rely, not only upon the statute of Ohio defining credits, but also on its practical operation in exempting moneyed capital in the hands of individuals in Ohio from taxation. The practical operation of a law of that character, to show how much, if any, discrimination there is, is a question of fact to be determined upon the evidence. A large amount of evidence was taken in the former suit and the court, in its decree, found the averments of fact as to the practical operation of the law of Ohio, in the bill, to be fully sustained. In other words, the court found the fact to be that for the years there in-

volved, the statute of Ohio, as enacted, operated to exempt so large an amount of the moneyed capital in the hands of individuals in that state as to discriminate against the holders of the complainant's shares, and result in the taxation of the stock at a much greater rate than was assessed upon other moneyed capital in the hands of individual citizens of Ohio. The adjudication, therefore, upon which the complainant relies, is an adjudication, not of law, but of fact; not of the fact at issue in the present case, but of the fact as to the practical operation of the law at the time of that adjudication, to wit, in 1887, in 1893 and in 1894.

"In this aspect, the fact as to the practical operation of the law in 1896 may be different from that in 1887 and the other years. A finding of the fact in 1887 does not conclusively establish a different fact of the same character in 1896 and 1897.

"For this reason, I cannot sustain the contention made on behalf of the complainant that the former adjudication conclusively entitled the complainants to the same relief as that which was granted it in the Whitbeck case.

"The exceptions to the master's report on this ground are, therefore, overruled."

It is thus shown by the opinion of the court that the judge who heard the case approached this question of res adjudicata somewhat in opposition to the claims of the treasurer herein, and was inclined to hold that the decree rendered in 1887 was a bar to any further proceeding involving those same questions as to the year 1897, but upon complete investigation held the Whitbeck case to be no bar to the present action.

If the opinion of the Circuit Court of Appeals is carefully studied, it will be observed that that court agrees in the proposition that the Whitbeck case was decided upon an *erroneous assumption* as to what the Statute of Ohio, (Sec. 2730), really contained. I quote from their opinion, (Rec. p. 456):

> "The proposition decided by the Supreme Court was, assuming the Ohio Statute to be different from what the bill declared it to be, and that it provided that moneyed capital, with the single exception of national bank shares, might have such deduction, it afforded an unlawful discrimination against

such shareholders within the meaning of the Federal Statute. *In other words, the Supreme Court decided the question upon an erroneous assumption, not based on the allegations in the bill of complaint or certified in the questions submitted.* The general decree in favor of the bank in that case can be supported by the unlawful discrimination in the increased valuation of the shares of the banks. *The real question made under the Statutes of Ohio, as they in fact existed, was not passed upon by the Supreme Court of the United States in that case.*

The Circuit Court of Appeals recognizing that the judgment in the Whitbeck case, could not be plead as *res adjudicata* in the case at bar, because decided upon an "erroneous assumption" as to the Ohio Statute, said:

> "The general decree in favor of the bank in that case can be supported by the unlawful discrimination in the increased valuation of the shares of the bank."

We admit that the Whitbeck decision can be so sustained; because, it was found as a fact in that case that unlawful discrimination did exist against the bank by reason of a lower valuation adopted in eleven other counties of the state. (127 U. S., 193.) But that does not avail the bank as *res adjudicata* here, unless the same state of facts also appear in the case at bar. The Master found as a fact (Rec. p. 40), as follows:

> "But there is nothing in these reports or in the evidence elsewhere to show what portion of credits consists of moneyed capital in the hands of individuals which in fact enters into competition for business with National banks. Nor is there any evidence as to what the total moneyed capital in the hands of individual citizens and included in the term credits amounts to.
>
> * * * * *
>
> *There is nothing in the evidence that will show whether shares on incorporated banks in the counties of the state outside of Cuyahoga county were valued for taxation by the auditors at a higher or lower percentage compared with the true value in money of their stocks than were the banks of Cuyahoga county, and hence the master is unable to report or find whether there was any unjust discrimination as between other incorporated banks and the complainant bank, and against the complainant bank."*

Such discrimination not existing here, as it did exist in the Whitbeck case, and it having been decided upon an "erroneous assumption" as to the Ohio Statute, what merit is left in it, upon which to predicate a claim of *res adjudicata?* It is an able exposition of the law as applicable to the proven facts, then existing, but not available to the bank as an eternal rule to shield it against the payment of its just taxes.

But the Circuit Court of Appeals went further, and entirely destroyed the claim of the bank that the decree of 1887 was *res adjudicata*, in the following language, (Rec. p. 457):

> "In view of the foregoing comments on the decision in the Whitbeck case, and the erroneous assumption therein of the character of the Ohio Statute, we are not prepared to say that the judgment in that case was *res adjudicata* as to the rights of complainant stockholders to deduct their debts from their shares of national bank stock."

It thereupon abandons the decree of 1887, and with that the Whitbeck case passes out of further consideration; but they say, (Rec. p. 458):

> "A different question is presented by the allegations of former adjudication in the bills filed in 1893 and 1894." And they hold, (Rec. p. 461):
>
> "The former adjudications in the cases of *1893 and 1894* are conclusive between the parties, notwithstanding the subsequent decision of the Supreme Court in the Chapman case. In reaching a contrary conclusion, we think the Master as well as the Circuit Court erred."

In brief, that court held that the decree of 1887 could not avail the bank, but that the decrees rendered in the case of 1893 and 1894 would so avail.

This was error.

(a) In holding that any decree of *1894* was *res adjudicata;* because no such decree was plead by complainant. The only decrees plead as *res adjudicata* were those of April 8, 1887; May 14, 1888; September 28, 1889, and December 30, 1893. (See Bill of Complaint, Par. 15 and 16, pp. 10-11, Rec.)

(b) The court having eliminated the decree of April 8, 1887, (the Whitbeck decree), and not having held that the decrees of May 14, 1888, and September 28, 1889, constituted former

adjudications, we are not concerned with any of those plead except that of December 30, 1893. That decree is found on pp. 256-257 of Record, being case No. 5122, and is rendered upon a bill of complaint that contains the Whitbeck decree as its sole ground for relief.

(c) The grounds urged by the learned Circuit Court of Appeals that the Whitbeck decree could not avail the bank as *res adjudicata*, likewise destroys the decree of December 30, 1893, because the former is made the basis of the latter. (Rec. p. 250.) If not of any force in the decree of April 8, 1887, it cannot be in the decree of December 30, 1893.

(d) Other and different issues are presented in the Bill of Complaint (Rec. pp. 3-12) than were embraced in the bill of June 27, 1893, (Rec. pp. 246-251).

(e) The decree of April 5, 1894, (Rec. p. 270), is a decree by default; it cannot operate as a prior adjudication; it only admits for the purpose of the action the legality of the claim or demand in suit; it does not make the allegations of the declaration or complaint evidence in an action upon a different demand. (94 U. S., 356.)

But we desire to further show, that, in the language of this court in the case of New Orleans vs. Citizens' Bank, 167 U. S., 372, the questions made in the case of 1887 were not "made upon identically the same facts and circumstances as those here presented." They cannot, therefore, be res adjudicata conclusive upon the parties and estop the appellee from attempting to enforce such taxes. The point to which we directly call the court's attention is found in the Finding of Facts, Record, pp. 58 and 59, being a quotation from the bill of complaint in the old case of Mercantile National Bank of Cleveland against Horatio N. Whitbeck, Treasurer, and is as follows:

> *Second*—"That the laws of Ohio authorize and permit the owner of *credits* to deduct therefrom *all debts* owing by him. It requires him to list for taxation only the excess of credits over his indebtedness."

That averment is not contained in the bill in the case at bar. But, on the contrary, the averment that most nearly approaches it is as follows:

> "The complainant further avers that a large amount of *moneyed capital* in the hands of individual citizens of the State

> of Ohio invested in promissory notes and other legal obligations, securities, claims, and demands, amounting to several hundred millions of dollars, is, by the aforesaid provision, allowed a deduction of legal, bona fide debts to be made therefrom, expressly exempted from taxation."

It will be observed by the court that the proposition presented in the Whitbeck case was the right to deduct from credits generally *all debts,* while in the case at bar, the proposition is to deduct from *certain credits,* defined by Section 2730 of the Revised Statutes, *certain debts* which are also defined by the Statute.

The one proposition does not embrace the other, for it has been repeatedly held by the Supreme Court of the United States that a partial exemption of certain property from taxation does not create an inequality or a discrimination such as is provided against by Section 5219 of the Revised Statutes of the United States, and also provided against by Section 2, of Article 12, of the Constitution of Ohio, which says, "That laws shall be passed taxing by a uniform rule all moneys, credits, etc."

> Albany County vs. Stanley, 105 U. S., 305.
> Lionberger vs. Rouse, 9 Wall, 468.
> New York vs. Comrs. of Taxes, Wall, 244.
> Hepburn vs. School Directors of Carlisle, 23 Wall, 480.
> Adams vs. Nashville, 95 U. S., 19.

We paraphrase the same inquiry made by the Supreme Court U. S. in New Orleans against Citizens' Bank, 167 U. S., quoting from page 389, and inquire:

> "Was the final decree in the Whitbeck case, which held that there was no power to lay taxes on the valuation of the shares of that bank for the year 1887, *based upon the identical claim of exemption* now asserted by that bank in order to defeat the taxes here in question?"

We must conclude that the claims of exemptions made in these different cases are not identical. One claims it for *all debts* from *all credits;* the other claims it for *some debts* from *some credits,* as specifically defined by the Ohio statute. Quoting again from the above decision:

> "It must appear the question of exemption was necessarily presented and determined upon identically the same facts upon which the right of exemption is now claimed."

In the City of New Orleans vs. Citizens Bank, 167 U. S., 371, the

judgment relied upon as res adjudicata was one in which it was sought to enjoin the taxing authorities not from enforcing an assessment already levied, but to enjoin them from making any assessment whatever against it, on the ground that its charter exempted it from taxation. And upon that ground only, the judgment was rendered enjoining any tax assessment proposed to be made in the future. Thus the right to exemption from taxation for the future was presented and litigated, and decided in favor of the bank. Not so with the case at bar. The Whitbeck case, pleaded as res adjudicata in this case, was an action brought by the bank for and on behalf of its stockholders to enjoin the collection of a tax assessment already levied, and on the grounds of discrimination, under the provisions of Section 5219 of the Revised Statutes of the United States, against the shares of national banks in favor of other moneyed capital. First: In assessing the shares of national banks at a higher rate than other moneyed capital. Second: In not permitting the share holders to deduct their bona fide debts from their shares of stock. The Whitbeck case involved an assessment for *one year only, nothing more*. Each subsequent tax assessment must always involve new facts. While the same principle of law might be involved, yet the subject matter must necessarily be entirely distinct each year.

> "Even parties and privies are bound only so far as regards the subject matter then involved, and would be at liberty to raise the same question anew in a distinct controversy affecting some distinct subject matter."
>
> Cooley's Constitutional Limitations, p. 63.

The principle we contend for is so admirably stated in the case of Keokuk & Western Railroad Company vs. Missouri, that we take the liberty of quoting at length.

> "A suit for taxes for one year is no bar to a suit for taxes for another year. The two suits are distinct and separate causes of action. If there were any distinct question litigated and settled in the prior suit, the decision of the court upon that question might raise an estoppel in another suit upon the principle stated in Cromwell vs. County of Sac, 94 U. S., 351.
>
> * * * * *
>
> The same principle was reaffirmed in Nesbit vs. Riverside Independent District, 144 U. S., 610, and Wilmington & Weldon Railroad vs. Alsbrook, 146 U. S., 279, 302. In the case of Davenport vs. Chicago, Rock Island, &c. Railway, 38 Iowa,

633, 640, the Supreme Court of Iowa held that a decree in favor of a railway company in a suit for taxes for a prior year would not estop the State from collecting the taxes for a subsequent year, each year's taxes constituting a distinct and separate cause of action. "The cases," said the court, "are unlike those where two causes of action (as two prmissory notes) forming the subject matter of successive actions between the same parties, both growing out of the same transaction, in which a defense set up in the first suit, and held good, will conclude the parties in the second. * * * Taxes of separate years do not in any just sense, grow out of the same transaction. They are like distinct claims on two promissory notes made upon two distinct and separate, though similar, transactions between the same parties. A judgment on one of such notes, it is quite clear, would not be of any force as an estoppel in an action on the other note between the same parties." It could never be tolerated that the State should be forever barred in its collection of taxes by an erroneous decision."

In the case of City of Newport vs. Commonwealth, 50 South Western Reporter, 845 (Kentucky Court of Appeals), it was held that,

> "A judgment for defendant in an action to recover taxes for one year is not a bar to an action to recover taxes on the same property for another year."

We believe it proper here to say, that we consider this an attempt on the part of the defendant bank, to extend the doctrine of estoppel far beyond what any of the authorities warrant. If their view is accepted, it gives to complainant bank the right to deduct the debts of its shareholders from the value of its shares, for taxation purposes, being a right denied by this court to any other bank in Ohio, (173 U. S., 205). This is supposed to be done under a constitution containing a section requiring taxation to be by uniform rule, and another, saying, "*All* property employed in banking, shall always bear a burden of taxation equal to that imposed upon the property of individuals."

Therefore, we conclude that the decrees plead in bar can not constitute a bar or estoppel between these parties, referring to a different year based upon a different claim of exemption, and not being conclusive upon the facts it is not conclusive of the law governing the questions presented. Respectfully submitted,

J. M. SHEETS, Atty. Gen'l.

P. H. KAISER, County Solicitor Cuyahoga County.

SMITH W. BENNETT, of Counsel.

2659

No. 227.
Sup. Ct. Bf. of Sheets, Kaiser & Bennett for Appellant.

Supreme Court of the United States.

No. 227.
Filed April 7, 1902.

MARCELLUS A. LANDER AS TREASURER OF CUYAHOGA COUNTY, OHIO,

APPELLANT,

vs.

THE MERCANTILE NATIONAL BANK OF CLEVELAND, OHIO,

APPELLEE.

SUPPLEMENTAL BRIEF.

We considered it necessary to file a supplemental brief herein to dwell more at length upon the proposition contained in the amendment to the answer of the county treasurer, thereby raising the same inquiry which was presented below, that the reply contained in the amendment to the answer constitutes a full defense to the matters contained in the bill.

The amendment to the answer filed herein (Rec., pp. 28-31) presents the question, that the Board, composed of the Governor, Auditor of State and Attorney General, commonly known as "The Board of Tax Revision," created under Section 167 of the Revised Statutes of Ohio, had, at the time of the commencement of these actions in the Circuit Court of the United States, full power to hear and determine upon the complaint of any of said banks as to the amount of taxes illegally assessed, and that said Board could

remit any amount of taxes and penalties upon the duplicate, found by them to have been illegally assessed.

That if said contention be true, the Federal court has no jurisdiction to review the proceedings had before the Board for the equalization of bank values, by an equitable remedy, as by injunction, or in any other form, for they are not courts of error to review the findings of State officers, boards or courts, and their jurisdiction in such matters as are involved in these actions, can not be appealed to until the remedies provided by the Statutes of the State have been invoked and relief refused.

The well known rule of procedure in equity has been adopted in the Revised Statutes of the United States to govern the procedure in equity in all of the Federal courts. Section 723, R. S., U. S., is as follows:

> "Suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law."

This lays the predicate for the inquiry. Was there a plain, adequate, and complete remedy provided by the Statutes of Ohio for the complainant in these actions?

Section 167 of the Revised Statutes of Ohio is as follows:

"He (The Auditor of State) may remit such taxes and penalties thereon as he ascertains to have been illegally assessed, and such penalties as have accrued or may accrue in consequence of the negligence or *error of any officer required to do any duty relating to the assessment of property for taxation, or the levy or collection of taxes; and he may, from time to time, correct any error in any assessment of property for taxation or in the duplicate of taxes in any county; provided, that when the amount to be remitted in any one case shall exceed one hundred dollars he shall proceed to the office of the Governor and take to his assistance the Governor and Attorney-General, and in all such cases may remit no more than shall be agreed upon by a majority of the officers named.*"

Full power shall be given to said Board to remit taxes and penalties in *any* amount, that may have accrued in consequence of the negligence or error of *any* officer required to do *any* duty relating to the assessment of property for taxation, or the levy or collection of taxes.

The word *"any"* is a word of general signification, and is synonymous to "all", and the word "all" is synonymous to the word "any."

Stone v. Elliott, 11 Ohio St., 258.
Smith Bridge Co. v. Bowman, 41 O. S., 37, (see p. 52).
Collector v. Hubbard, 12 Wall., 1.
Murray v. Brown, 91 U. S., 254.

It is impossible, we submit, to read Sec. 167 without giving it the broad, general interpretation which its language imports. It contains no word of restriction. The words used are plain and free from any ambiguity, and their meaning, so deduced, is consistent with the manifest purpose of the Legislature, which was, as we submit, that the State Auditor should act as its chief ministerial officer in all matters pertaining to the illegal assessment of taxes. It therefore conferred upon him power to "remit such taxes and penalties thereon as he ascertains to have been illegally assessed, and such penalties as have accrued or may accrue in consequence of the negligence or error of any officer required to do any duty," etc. And to fully and perfectly carry out this duty, it further authorized him to correct from time to time, "any error in any assessment of property for taxation or in the duplicate of taxes in any county." The Legislature evidently realized the broad power it was thus placing in the Auditor of State, and, as an additional safeguard, it therefore provided, "that when the amount to be remitted in any one case shall exceed one hundred dollars he shall proceed to the office of the Governor and take to his assistance the Governor and Attorney-General, and in all such cases may remit no more than shall be agreed upon by a majority of the officers named."

Language could not be employed to more broadly express the jurisdiction thus conferred. It embraces the negligence or error of *"any officer required to do any duty relating to the assessment of property for taxation"*, hence it embraces among others the Auditor of Cuyahoga County, the Treasurer of Cuyahoga County, and the State Board for the equalization of bank shares. By glancing at the bill of the plaintiff in all of these cases, it will be found in paragraph four (4) thereof that the plaintiff complains of the acts of the

County Auditor and of the Board for the Equalization of Bank shares, averring that the Board "had no jurisdiction or power to increase the valuation so fixed by the Auditor on the shares of the complainant for the year 1897." The increase of the valuation is made the ground of the plaintiff's grievance. If what plaintiff recites at great length in its bill be true, the power to correct such errors, if any, is given to the Board of Tax Revision and under the plainest principles of equity jurisdiction recourse cannot be had to equity until the plain legal remedy has been exhausted.

With the remedy provided by Section 167 Revised Statutes of Ohio, open to the plaintiff, why did it not make its application before said Board to "remit such taxes * * * illegally assessed * * * and to correct any error in * * * assessment, * * * or in the duplicate of taxes in (said) county"?

Surely, if the remedy thus provided was applicable, it was sufficiently comprehensive to embrace the relief desired.

This refusal or neglect on the part of the plaintiff to appeal to said board is attempted to be explained.

(1) By matter of fact.

(2) By matter of law.

Of these objections in their order.

(1) MATTER OF FACT.

The deposition of the Auditor of State, found on page 385 of the record of the testimony taken before the special examiner bearing upon this question, is as follows:

Q. Do you remember of a committee representing the plaintiff banks appearing at your office to inquire about the action of the Board for the equalization of bank values with regard to the action taken on the value of their bank shares? A. Yes, sir, a committee of the Cleveland banks called on our board for that purpose.

Q. State what took place between said committee and said board with regard to submitting their claims for reduction, grievances or errors claimed to the board as organized under Section 167 of the Ohio Statutes? A. The Board informed the committee that it was

too late to give a hearing and relief as a State Board of Equalization for banks, for the reason that the Board had adjourned sine die, but that we would give them a hearing under Section 167.

Q. State whether you then offered to convene said Board of Tax Revision organized under Section 167 to consider the cases of the various plaintiff banks? A. Yes, sir; we offered to convene the Tax Revision Board at such time as might be convenient for the representatives of the Cleveland banks to appear.

Q. Do you remember what their answer was, to the proposition so made, and why, if at all, they refused to submit their case to the consideration of said Board of Tax Revision for hearing? A. I do not remember all that was said in regard to the action of the Board under Section 167 but some doubt was expressed by some of the members of the committee that the Board would not have the power under Section 167 to afford as full relief as the Board of Equalization.

Q. State what the fact is as to whether they did or did not submit their case and grievance and alleged errors before said Board of Tax Revision? A. Only one of the Cleveland banks appeared before the Board, and that was Mr. Wilson of the First National, the others did not, the others declined under the advice of counsel."

We also cite the following testimony taken from that given by Mr. J. J. Sullivan found on pages 313 and 314 of the record of testimony taken before the special examiner:

A. *On the seventh of December, 1897, I received a letter* from the county auditor stating that the Board of Equalization had increased the valuation of our bank something over $100,000. The other national banks in the city received similar notices. The result was we had a meeting of the Clearing House for conference as to what to do. That meeting, I think, was about the tenth or twelfth of December. At that meeting a committee of five was appointed to go to Columbus to confer with the State Board of Equalization. The committee was composed of Joseph Colwell, F. E. Rittman, E. H. Bourne, M. G. Warner and myself. I was requested to arrange with the Governor for the meeting. I wired the

Governor immediately after the adjournment of our Clearing House meeting, and it was along about the twelfth of the month as I have said, asking for an appointment with the State Board of Equalization. He answered that Mr. Guilbert and Mr. Monnett were absent on their vacation and would not return to the city of Columbus until about the twenty-second of December, when he would arrange for a meeting with our committee. On the twenty-eighth of December I got a telegram from the Governor saying that the gentlemen comprising the Board with himself who were absent, had returned, and that they would meet our committee at 2 o'clock on Wednesday, December 29. We went the next day wiring the Governor beforehand saying we would be there. This is a copy of my telegram:

Q. What is the date of it? A. December 28.

By Judge Boynton: Read it.

Witness reads: "Governor Asa S. Bushnell, Columbus, Ohio, Our committee will meet State Board of Equalization tomorrow, Wednesday, at 2:30 p. m."

He said 2 o'clock, but as our train would not reach there until 2:30 I took the liberty to make the date a half hour later.

Q. Is that the extent of the explanation you desire to make? A. That covers it.

Q. Governor Asa S. Bushnell was the president of the Board for the equalization of bank values? A. Yes, that is why we addressed him.

Q. When you met there at the time did you file any complaint with said Board? A. Any written complaint, do you mean?—No.

Q. This was all prior to the time that the bank had paid their tax, was it not, up to December 28? A. Yes. We have been permitted to pay our tax a month later. Yes, it was prior to the time of the payment of our tax.

Q. After the members of said Board suggested to you that you could have any inequalities corrected—if they so did suggest—before them as a Board of Remission, did you submit any evidence before them as a Board of Remission? A. No, sir.

Q. Was there any evidence submitted at any other time before them, than what you have given? A. Do you mean pertaining to this particular meeting?

Q. Either before or after December 28? A. *No, not in regard to the tax of 1897.*

Q. You had received word from the County Auditor of the action of the State Board for equalization of bank values *on December 7, 1897*, had you not? A. That's my recollection."

This testimony thus shows that before the commencement of these actions, the plaintiff bank by its representative, was requested by members of said Board to lay before said Board the contention or grievance of said bank in the premises, and if anything was found wrong in the action of the Board for the Equalization of Bank Shares, or any error committed by said Board, or any amount charged against plaintiff bank that should be remitted, they would entertain the same, and do what was just in the premises. The answers of the various banks were, That the Board of Tax Revision *had no jurisdiction, and acting under advice of counsel they did not, and they would not appeal to it.*

The finding of the Special Master Commissioner upon the evidence adduced in support of this defense is found in paragraph eighth, record page 37, as follows:

> "At the time the persons who had composed the State Board of Equalization for Banks, and who are the same persons required to act under Section 167 of the Revised Statutes of Ohio, offered to convene and organize under said Section 167 to consider the case of the various plaintiff banks at such time as might be convenient for the representatives of the Cleveland banks to appear, some doubt was expressed by some of the members of the committee that the Board would not have the power, under Section 167, to afford as full relief as the Board of Equalization, and only one of the Cleveland banks appeared before the Board when organized under Section 167, viz, The First National Bank, the others declined to appear."

The question is fairly presented, that the banks having fair opportunity to present their contention before said Board of Tax Revision, *before these actions were begun, and before any other juris-*

diction might have attached, would said Board have had jurisdiction to hear and determine the question of the amount placed upon the duplicate against said plaintiffs and claimed to be an "excessive amount", and that should be deducted from the assessment against the plaintiff's shares" as claimed in Paragraph 13 et seq., of plaintiff's Bill?

We say that the Board of Tax Revision had jurisdiction so to do, the plaintiff contends it had not.

(2) MATTER OF LAW.

On the theory that said Board, organized under Section 167 Revised Statutes, had no authority to review the action of the County Auditor of Cuyahoga County and the Board for the Equalization of Bank Shares, organized under Section 2808 to 2810 of the Revised Statutes, these actions were instituted by said banks.

Section 167 Revised Statutes, vests certain powers in the State Auditor which are of an appellate and revisory character, and above the action of any officer required to do any duty relating to the assessment of property, or levy or collection of taxes.

There is but one limitation placed upon such power of the auditor, and that is a limitation as to amount.

"That when the amount to be remitted in any one case shall exceed one hundred dollars he shall proceed to the office of the governor and take to his assistance the governor and attorney-general, and in all such cases may remit no more than shall be agreed upon by a majority of the officers named."

With the governor and attorney-general acting in conjunction with the auditor of state, *no* limitation is placed upon their powers to hear and determine questions arising upon the actions of any board or officer constituting a part of the taxing machinery of the State.

All tax laws of the State of Ohio, taken together as a whole, provide for a summary method of collecting revenue. The various agencies adopted for such purpose consist of assessors, City Boards of Equalization, the different administrative officers who adopt the

rate and establish the purpose of the levy as county commissioners and councils of municipalities, County Boards of Equalization, County Auditors, County Treasurers, State Boards of Equalization, embracing the Board for the Equalization of Bank Shares, and the State Board for the equalization of the values of railroad property; a state board of appraisers and assessors, besides various special boards provided by statute for certain cities, and at the head of the whole system, above all such officers, and boards, the State Auditor, and the Board of Tax Revision, vested with revisory power by Section 167 Revised Statutes.

All these taxing officers are vested with quasi judicial power in the appraisal and assessment of property. They exercise discretion and judgment, and if they commit errors and mistakes the Board or tribunal is provided by Statute (Sec. 167) in which the same can be reviewed and corrected.

It is only when these various tribunals and authorities are appealed to and refused relief, or when they are guilty of fraud, that the courts step in to review and correct the valuations (and errors) of such taxing officers or tribunals.

"Our statutes have made ample provision for the correction of mistakes and errors of judgment committed by those intrusted, in the first instance, with the fixing of values upon taxable property. *Even unjust and corrupt discrimination can be relieved against, in the special tribunals provided by the statutes, for the equalization of values. As a general rule, the decisions of these boards must be held to be final and conclusive. To these boards and not to the courts, must complaints as to inequalities in valuations be preferred*"
* * *

"There is nothing in the record to lead us to believe that the annual city and county boards of equalization would not, if complaint had been made, have advanced the valuation of all other property in the county, to its true value in money. *The opportunity provided by law for the correction of the inequalities complained of, was omitted.*" * * *

"Equity will not afford relief to a complainant who cannot show that the burden imposed on him is greater than it would have been, if the laws had been faithfully executed, by taxing all property by a uniform rule, and according to its true value in money; *and also,*

that the tribunals provided in the system of taxation, for redress against irregularities, had been appealed to in vain."

Wagoner v. Loomis, 37 O. S., from page 582.

In the case of the State ex rel. v. Jones, Auditor, 51 O. S., 492 to 518, the question was raised as to the extent of jurisdiction vested in The Board of Tax Revision under Section 167 Revised Statutes. It was contended that the "Nichols Law", creating the Treasurer, Attorney-General and Auditor of State a Board of Appraisers and Assessors, by which to levy an excise tax upon express, telegraph and telephone companies, was unconstitutional, and among other reasons assigned was the following, being paragraph four of defendant's answer. (See page 499 supra):

"The property of said company is taken without due process of law, in violation of the 14th amendment of the constitution of the United States, in this, that there is no provision for a notice to the company, and for a hearing by the board of appraisers and assessors, and no appeal is provided to any superior authority for the correction of illegal, erroneous or excessive valuations."

The court in passing upon that point said:

"It is said however, that the act under consideration makes no provision for an appeal to any higher authority, board or tribunal authorized to hear complaints, and correct excessive, illegal or erroneous assessment. The power vested in the State Auditor, by Section 167 of the Revised Statutes, to correct errors of assessment, though not supplying a complete remedy, is not inapplicable we think, to the procedure under the Act of April 27, 1893, (90 O. L., 331). The Section reads as follows: (Section 167).

"This section is *in pari materia*, and is a part of the taxing system of the State, or of the machinery for collecting the public revenue. The Nichols Law is part of the same system and is merely an amendment and supplement of the sections of the statute regulating express and telegraph companies. While it might seem improper to submit the quasi judicial action of a board composed of the Treasurer, Attorney General and Auditor of State to the review of the State Auditor alone, it would not seem exceptional when the amount of taxes to be remitted exceeded one hundred dollars, that there might be an appeal to a board consisting of the Governor, Auditor of State and Attorney-General."

So that in the case cited it was distinctly held that the Board of Tax Revision has revisory or appellate powers over the acts of the

Board of Appraisers and Assessors, appointed under Sections 2772 et seq., of the Revised Statutes. Such board is part of the taxing machinery of the State, with power to pass upon the value of the different companies' property in this State for taxation, pursuant to established rules. From the judgment of said Board of Appraisers and Assessors a right of appeal is held to lie to the Board of Tax Revision.

Likewise, the Board for the Equalization of Bank Shares, created under Section 2806, et seq., Revised Statutes, is also part of the taxing machinery of the State, with power to pass upon the value of shares of incorporated banks for purposes of taxation. And from the judgment of said board it likewise follows that a right of appeal lies to the Board of Tax Remission under Section 167, Revised Statutes, for if such remedy is applicable in the one case it is in the other also.

In the more recent case of the State of Ohio ex. rel. The Commissioners of Marion County vs. Charles W. Lefller, Treasurer, etc., found in Vol. 40, No. 9, W. L. B., pages 174 to 182, the same point was again decided by the Supreme Court of Ohio; holding that the Board of Tax Revision has authority to review the action of other taxing officers, and to remit taxes illegally assessed.

In the case of Black et al., Trustees, vs. Haggerty et al., 60 Ohio State, 551 to 559, the above unreported case is affirmed by the whole court upon the proposition we here contend for. The Supreme Court of Ohio did hold in that case that the Board of Tax Revision created under Section 167 R. S., had no authority to substitute its judgment for the judgment of the Cleveland Board in a case in which it might legally act, and it held that the attempted substitution of the judgment of the State Board for the judgment of the Cleveland taxing officers was without authority because that section only grants authority to remit taxes which had been charged without authority of law. The court used the following language on page 558, supra:

> "The case (State ex rel. Commissioners v. Leffler, supra) is authority for the proposition that the Auditor of State may remit additions and penalties charged by the county auditor against a corporation without authority of law; nothing further was presented or decided, and this, we think, suggests the limits within which the State Auditor may act in making such remissions."

That is the identical question presented here, and the claim is set forth in paragraph 4 of the plaintiff's bill, hereinbefore cited, that the additions complained of as made by the State Board for the Equalization of Bank Shares were illegally made, and the additions thereto were without authority of law.

The power to raise revenue for the needs of the State, and its institutions, is a matter of State legislation and under State control. This being true the State Legislature has the power to prescribe the methods of hearing and determining all controversies relating thereto, both to the State and the taxpayer.

The power vested in the Legislature by the Constitution authorizes the enactment of such laws as will effect these objects.

The Constitution of Ohio provides, in part (Section 2, Article XII):

"Laws shall be passed taxing by a uniform rule, all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise; and also all real and personal property according to its true value in money." * * *

Section 3, Article XII, provides:

"The General Assembly shall provide by law for taxing the notes and bills discounted or purchased, moneys loaned, and all other property, effects, or dues, of every description (without deduction), of all banks, now existing or hereafter created, and of all bankers, so that all property employed in banking shall always bear a burden of taxation, equal to that imposed on the property of individuals."

Section 4, Article XII, provides:

"The General Assembly shall provide for raising revenue, sufficient to defray the expenses of the State, for each year, and also a sufficient sum to pay the interest on the State debt."

In the light of the above sections taken from the Constitution of Ohio, there can be no question but that the Legislature had the au-

thority vested in it to create the methods by which taxes for State and municipal expenses should be collected, and also to create the forums or tribunals within which all disputed questions, with regard to levy, assessment, valuation, etc., should be determined. This principle is not hostile to the Constitution, State or Federal, nor to the Bill of Rights. The true rule for ascertaining the powers of the Legislature is to assume its powers, under the above general grants, to be ample enough for any enactment within the scope of legislation, unless restrained by the terms or the reason of some express inhibition.

The State, Etc., vs. Covington, 29 O. S., 102.
The State ex. rel. Herron vs. Smith, 44 O. S., 372.

The legislative determination of such questions is conclusive upon the courts, unless it appears upon the face of the statute, or from facts of which the courts must take judicial cognizance, that the statute infringes rights secured by the fundamental law.

127 U. S. Rep., 678.

CAN THE FEDERAL COURT GRANT THAT RELIEF?

The Supreme Court of the United States cannot review the assessment made by the State officials upon the ground that it is excessive.

Stanley vs. Supervisors, 121 U. S., 549.

The courts cannot, in such cases, take upon themselves the functions of a revising or equalizing board.

Newman vs. Supervisors, 45 N. Y., 676, 687.
Nat. Bank of Chemung vs. Elmira, 53 N. Y., 49-52.
Bruecher vs. Village of Portchester, 101 N. Y., 240, 244.
Lincoln vs. Worcester, 8 Cush., 55-63.
Hicks vs. Westport, 130 Mass., 478.
Balfour vs. Portland, 28 Fed. Rep., 738.

"In nearly all the states, probably all of them, provision is made by law for the correction of errors and irregularities of assessors in the assessment of property for the purposes of taxation. This is generally through boards of revision or equalization, as they are often termed, with sometimes a right of appeal from their decision to the courts of law. They are established to carry into effect the

general rule of equality and uniformity of taxation required by constitutional or statutory provisions. Absolute equality and uniformity are seldom, if ever, attainable. The diversity of human judgments, and the uncertainty attending all human evidence, preclude the possibility of this attainment. Intelligent men differ as to the value of even the most common objects before them—of animals, houses and lands in constant use. The most that can be expected from wise legislation is an approximation to this desirable end; and the requirement of equality and uniformity found in the constitutions of some states is complied with, when designed and manifest departures from the rule are avoided.

To these boards of revision, by whatever name they may be called, the citizen must apply for relief against excessive and irregular taxation, where the assessing officers had jurisdiction to assess the property. Their action is judicial in its character. They pass judgment on the value of the property upon personal examination and evidence respecting it. Their action being judicial, their judgments in cases within their jurisdiction are not open to collateral attack. If not corrected by some of the modes pointed out by statute, they are conclusive, whatever errors may have been committed in the assessment. As said in one of the cases cited, the money collected on such assessment cannot be recovered back in an action at law, any more than money collected on an erroneous judgment of a court of competent jurisdiction before it is reversed." 121 U. S., 550.

Our view of this question, that the Federal Courts cannot be appealed to in such case by injunction where a remedy at law exists, is fully sustained in the case of Dows vs. The City of Chicago, 78 U. S. Reports, p. 108. The court say:

"Assuming the tax to be illegal and void, we do not think any ground is presented by the bill justifying the interposition of a court of equity to enjoin its collection. The illegality of the tax and the threatened sale of the shares for its payment, constitute of themselves alone no ground for such interposition. There must be some special circumstances attending a threatened injury of this kind distinguishing it from a common trespass, and bringing the case under some recognized head of equity jurisdiction, before the preventive remedy of injunction can be invoked. It is upon taxation that the several states chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible. Any delay in the proceedings of the officers, upon whom the duty is devolved of collecting the taxes, may derange the operation of the government and

thereby cause serious detriment to the public. No court of equity will therefore allow its injunction to issue to restrain their action, except where it may be necessary to protect the rights of the citizen whose property is taxed, *and he has no adequate remedy by the ordinary processes of the law.*"

We quote again from page 112 of the same report:

"The party of whom an illegal tax is collected has ordinarily ample remedy, either by action against the officer making the collection or the body to whom the tax is paid. Here such remedy existed. If the tax was illegal, the plaintiff, protesting against its enforcement, might have had his action, after it was paid, against the officer or the city to recover back his money, or he might have prosecuted either for his damages. No irreparable injury could have followed to him from its collection. Nor would he have been compelled to resort to a multiplicity of suits to determine his rights. His entire claim might have been embraced in a single action."

In a great number of cases it will be found where the jurisdiction of the Federal Court was not questioned, but where the parties submitted themselves to its jurisdiction, the court upheld the jurisdiction, but it *was by reason of it not having been questioned by either side.* As was said by the court, per Justice Field, in 11 Wallace, p. 110:

"In the cases where equity has interfered, in the absence of these circumstances, it will be found, upon examination, that the question of jurisdiction was not raised, or was waived. Such was the case of the Bank of Utica vs. The City of Utica, where the tax was illegal, and the chancellor stated that the complainant had a complete remedy at law, but as the parties submitted themselves to the jurisdiction of the court, he passed upon the case and enjoined the defendants from collecting the tax. So in the case of the Utica Manufacturing Co. vs. The Supervisors of Oneiga County, a demurrer to a bill filed to restrain an illegal tax having been overruled, the chancellor affirmed the ruling, stating, however, that as no question was raised by counsel respecting the jurisdiction of the court, he had not considered whether it was a proper case for equitable cognizance. Numerous cases are found in the reports where jurisdiction has been taken under similar circumstances and the collection of an illegal tax restrained, but our attention has not been called to any well-considered case where a court of equity has interfered by injunction after its jurisdiction was questioned, except upon some one of the special circumstances mentioned."

We are not in this part of our brief discussing the proposition as

to whether or not *The Board for the Equalization of Bank Shares,* had or had not jurisdiction to make the addition to the amount charged against plaintiff on the duplicate, but we here contend, *that independent of whatever action was taken by said board,* there can be no question but that plaintiff's remedy for the correction of any error, inequality or injustice, if any, was before the Board of Tax Revision under Section 167, Revised Statutes, and under the above authorities the plaintiff must submit to the jurisdiction *"of these boards of revision, by whatever name they may be called, for relief against excessive and irregular taxation," and cannot appeal to the Federal Court.*

The court in the case of Dows vs. The City of Chicago, supra, said on page 112:

"If the tax was illegal the plaintiff protesting against its enforcement might have had his action after it was paid, against the officer of the city to recover back the money or he might have prosecuted either for his damages. No irreparable injury would have followed to him from its collection. Nor would he have been compelled to resort to a multiplicity of suits to determine his rights. His entire claim might have been embraced in a single action."

In that case the question was raised by demurrer to the bill. In the case at bar we raised the question by an amendment to the answer, tendering the issue that an adequate remedy at law exists and for that reason this court could acquire no jurisdiction.

The adequate remedy is not alone the proceeding before the Board of Tax Revision under Section 167 of the Revised Statutes of Ohio, but we have also various statutes for relief against illegal taxes and assessments.

The following sections are in point:

"Section 5848. The Courts of Common Pleas and Superior Courts shall have jurisdiction to enjoin the illegal levy of taxes and assessments, or the collection of either, and all actions to recover back such taxes and assessments as have been collected, without regard to the amount thereof, but no recovery shall be had unless the action be brought within one year after the taxes or assessments are collected."

As decisions under this section construing its operation by the

Supreme Court of Ohio, it has been decided that taxes paid under protest may be recovered back in the following cases:

Andrew Stevens, Treas. of Lucas Co., vs. R. C. Daniels, 27 O. S., 527.
Western Union Tel. Co. vs. Mayer, Treas., 28 O. S., 521.
Catoir vs. Watterson, 38 O. S., 319.

Upon this question the case of Beeson vs. Johns, 124 U. S., page 56 to page 60, is instructive. In that case it was shown that the lands of the plaintiff "were assessed and valued and equalized and taxed by the officers and authorities making such assessment and equalization and taxation at a higher price and value and at a higher rate of tax than the property and lands of resident owners of property and lands in the same township and county for the same year, and that all the other lands and property in said township, except the lands of non-residents of Iowa were assessed, equalized and taxed at a value and rate far below its actual cash value."

It was claimed that the assessment was void and was in fact no legal assessment of said lands and the proceeding based thereon and sale are void. The plaintiff was a non-resident land owner in said State. When the matter came before the Board of Equalization the record shows that full action was taken "on motion the Board proceeded to the equalization of assessments. A motion was made that all lands in the county assessed to unknown owners be assessed at $6.00 per acre, and an amendment was offered that said lands be assessed at $5.00 per acre, which motion carried."

The court in commenting upon this discrimination against unknown owners of land situated in said State (page 59) said:

"If a tax were levied under a law of the State which required either the assessment, or the rate levied upon that assessment, to be more favorable to the resident owners of the property than those who resided in another State, all assessments and sales under such a statute might possibly be declared to be void. But where the question relates to the action of a single assessor, or of a township or county board of equalization, and does not profess to be carried on with any purpose of making such discrimination, the mere errors in assessment *should be corrected by proceedings which the law allows before such sale* or before a deed is finally made, there is no sufficient evidence in this case of any purpose to discriminate

against the owners of lands in controversy, nor of any actual injury to him by the assessment which was made upon his property."

Under such circumstances a correction or abatement should have been applied for as provided by law. The assessment and levy were not void and for the correction of the error the remedy provided by law is ample for the complete protection of the taxpayer.

The remedy provided by Section 167, which was offered to the said plaintiff bank and rejected by it, is ample to correct all injustice, if any, that may have been done to the plaintiff, and that power existing must be applied to or the jurisdiction of this court cannot attach.

Again in the case of Stanley v. Supervisors of Albany, 121 U. S., page 535, the principle is again upheld by that court; but in that case the court forbid the action at law to recover the excess of taxes paid beyond what should have been levied on a just valuation in the following language:

"When the statutes of a state provide a board for the correction of errors and irregularities of assessors in the assessment of property for purposes of taxation, the official action of that body is judicial in character, and its judgments are not open to attack collaterally.

"*A party who feels himself aggrieved by overvaluation of his property for purposes of taxation, and does not resort to the tribunal created by the state for correction of errors in assessments before levy of the tax, cannot maintain an action at law to recover the excess of taxes paid beyond what should have been levied on a just valuation.*"

Upon this proposition we also cite the case of Hepburn vs. The School Directors, found in the 90th U. S. Reports, page 480, to 485.

By the statutes of the State of Pennsylvania, the tax assessed on moneyed capital in the hands of individuals is upon the par or nominal value; one of the questions presented there was when taxes were levied on national bank shares could they be taxed *at an amount above their par value;* this having been done the statute of Pennsylvania *provided that an appeal to the Auditor General could be made by the party aggrieved, who was authorized to inquire into the value and to correct any error which might appear.*

This Hepburn did not do, but undertook to appeal to the Federal courts for relief, (as in the case at bar). The Supreme Court of the U. S. held:

"What the amount of this share is, must, in some form, be ascertained in order to determine its taxable value. If the nominal or par value of the stock necessarily indicated this amount, there might be some propriety in making that the taxable value; but, as all know, such is not the case. The available moneyed capital belonging to a bank may be diminished by losses or increased by accumulated profit. Therefore some plan must be devised to ascertain what amount of money at interest is actually represented by a share of stock. The State of Pennsylvania has provided that this may be done by an official appraisement taking care to prevent abuses by declaring that such appraisement shall not be higher than the current market value of the stock at the place where the bank is located, and by giving an appeal to the Auditor General, who is authorized to inquire into the value and correct any errors that may appear. There certainly is no apparent injustice in this, it is not the amount of money invested which is wanted for taxation, but the amount of moneyed capital which the investment represents for the time being. * * * If a shareholder is not satisfied with the original appraisement, all he has to do is to appeal to the Auditor General, make known to him the actual condition of the affairs of the bank, and have the error, if any exist, corrected. *Hepburn did not see fit to avail himself of this right which he had. He preferred to rest upon his supposed right, under the act of Congress to limit the power of assessment to par value. This right, we think, he did not have.*"

It was said in the case of Chamberlain vs. Walker, decided March 13, 1894, by the C. C. U. S. for the district of South Carolina (60 Fed. Rep., 788) that the Federal courts cannot review the assessment made by the state officials simply on the ground that it is excessive, being the same point decided in Stanley v. Supervisors, 121 U. S., 549. Nor can it make a new assessment or direct another to be made, decided in the State Railroad Tax cases, 92 U. S. 615. Nor can such court interfere upon the ground that the tax is illegal, decided in Williams v. Supervisors, 122 U. S. 154 and in Lyon v. Alley, 130 U. S. 177. Nor can it interfere because the court would prefer, and would have adopted, a different system, decided in Western Union Tel. Co. v. Attorney General, 125 U. S.

533, and in Davenport Nat. Bank v. Davenport Board of Equalization, 123 U. S., 83.

The rule in all such cases, recognizes the supremacy of the State courts and tribunals for the settlement of all questions arising from the system adopted by the State for the raising of the revenues of the State, conceding of course that where a Federal Statute is violated, or the Federal Constitution intrenched upon, the right to have the same determined by a Federal tribunal. But in the determination of such questions, the *court will not search for a federal question* to sustain its jurisdiction, where it is apparent from the Record that the questions presented are such as should have been heard before a State Board, Tribunal or Court.

Smith vs. Adsit, 83 U. S., 185.

"So long as a State, by its laws prescribing the mode and subjects of taxation, does not intrench upon the legitimate authority of the Union, or violate any right recognized or secured by the Constitution of the United States, this court, as between the State and the citizen, can afford him no relief against State taxation, however unjust, oppressive or onerous" it may be.

Kirtland v. Hotchkiss, 100 U. S., 498.
Memphis Gas Light Co. v. Shelby Co., 109 U. S., 398.

"All these are questions for the State alone."

The Supreme Court of Ohio, in the foregoing cited cases, State ex rel. v. Leffler; and Jones v. Auditor, supra., having decided that the Board of Tax Revision has jurisdiction to grant the relief, if any, needed, to complainant bank, *such question of jurisdiction is not a federal question and cannot be considered here.*

"Whatever may have been the reason for the decision, whether the court had jurisdiction of the case or not, is a question exclusively for the judgment of the State Court."

83 U. S., 185-190.

Respectfully submitted,

J. M. Sheets, Attorney General.

P. H. Kaiser, County Solicitor, Cuyahoga County.
Smith W. Bennett, of Counsel.

Office Supreme Court U. S.
FILED
APR 25 1902
JAMES H. McKENNEY,
Clerk.

No. 227.

Sup. Ct. Brf. of Sheets for Appt.

Supreme Court of the United States.

No. 227.

Filed April 25, 1902.

MARCELLUS A. LANDER, TREASURER, ETC.,
APPELLANT,

vs.

THE MERCANTILE NATIONAL BANK OF CLEVELAND, OHIO,
APPELLEE.

The case of New Orleans against Citizens Bank, 167 U. S., 371, cited and relied on by counsel for appellee, was a case where a charter had been granted to the bank. The charter thus granted could not be altered at the will of the legislature. In other words it was a contract. Not so in the case at bar. The statutes under which the appellee claimed the right to deduct debts from bank stock in the case of Whitbeck against Bank, 127 U. S., 193, might have been altered or repealed at the will of the law-making body, and that too without the consent of appellee. If these statutory provisions might have been altered or repealed without the consent of the appellee, it necessarily follows that the courts may change the construction heretofore placed on these statutes, and the bank must submit to the new construction.

If there are no contractual relations which would prohibit the law-making body from altering the law so as to take from

a person continuing advantages which he claims under a former decision, the courts also change their construction of the statutes so as to take away those same advantages. Suppose the statutes of Ohio had been properly interpreted in the Whitbeck case, and that after the decision in that case the legislature of Ohio had amended the statutes so as to read as they do now—so there would be no discrimination against national banks—the appellee could not continue, after such amendment, to deduct the debts of its share-holders from their stock in making its returns for taxation. A decision changing the construction placed by the courts upon a statute is similar in legal effect to an amendment of the statute by the legislature.

Douglass v. County of Pike, 101 U. S., 677, 687.

Respectfully submitted.

J. M. Sheets,
Attorney General of Ohio.

2000